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SUPREME COURT, U. S.

APPENDIX

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JOHN F. DAVIS,

Supreme Court of the United States

OCTOBER TERM, 1967

No. 335

THE HANOVER SHOE, INC.,
Petitioner,

v.

UNITED SHOE MACHINERY CORPORATION,
Respondent.

No. 463

UNITED SHOE MACHINERY CORPORATION,
Petitioner,

v.

THE HANOVER SHOE, INC.,
Respondent.

ON WRITS OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

Petition for Writs of Certiorari filed
(No. 335—July 7, 1967)
(No. 463—August 7, 1967)

Certiorari granted October 9, 1967

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Relevant Docket Entries United States Court of Appeals for the Third Circuit

Date	
1965	
Sept. 28	Copy of Notice of Appeal, rec'd. Sept. 13, 1965, filed.
	Record and exhibits (except as noted on original list), rec'd. Sept. 20, 1965, filed. (Covers 15626/15627). Exhs. in Exh. Rm.
Sept. 28	Copy of Notice of Appeal, rec'd. Aug. 23, 1965, filed.
Oct. 28	Supplemental record (Order amending opinion), filed. (Covers 15626/15627).
1966	
Apr. 1	Motion by Defendant for argument before Court en banc and to allow each side 90 minutes for argument, filed. (Covers 15626/15627). Affidavit of services attached.
Apr. 11	Submitted on Motion by United Shoe Machinery Corporation for oral argument before the Court en banc and to allow each side 90 minutes for argument. Coram: McLaughlin, Ganey and Freedman, Circuit Judges.
Apr. 11	Order (*McLaughlin,* Ganey and Freedman, Circuit Judges) denying motion for oral argument before Court en banc and to allow each side 90 minutes for argument, filed. (Covers 15626/15627).
May 3	Argued. Coram: Forman, Ganey and Freedman, Circuit Judges. (Copies of "Dec. 3, 1962 at New York" transcript handed to panel judges in court.)

1967

Apr. 11 Opinion of the Court (Forman, Ganey and *Freedman,* Circuit Judges), filed. (Covers 15626/15627).

Apr. 26 Petition for rehearing by Hanover Shoe (as appellant in 15627 and as appellee in 15626), filed. (Covers 15626/15627).

May 18 Order (Staley, Chief Judge and McLaughlin, Kalodner, Hastie, Forman, Ganey, Smith, *Freedman and Seitz, Circuit Judges*) denying petition for rehearing, filed. (Covers 15626/15627).

May 18 Opinion Per Curiam on Rehearing (Staley, Chief Judge and McLaughlin, Kalodner, Hastie, Forman, Ganey, Smith, *Freedman* and Seitz, Circuit Judges), filed. (Covers 15626/15627).

May 18 Supplemental Opinion (Forman, Ganey and Freedman, Circuit Judges), filed. (Covers 15626/15627).

May 18 Order Amending Opinion (Forman, Ganey and *Freedman,* Circuit Judges), filed. (Covers 15626/15627).

May 23 Motion by plaintiff (Hanover Shoe, Inc.) for stay of mandate, filed. (4 copies). (Covers 15626/15627). Affidavit of service and acceptance of service attached.

May 29 Order (Forman, Ganey and *Freedman,* Circuit Judges) staying issuance of the mandate until July 10, 1967, filed. (Covers 15626/15627).

June 7 Order (Forman, Ganey and *Freedman*, Circuit Judges) amending judgment, filed. (Covers 15626/15627).

June 7 Amended judgment vacating the judgment of the District Court, filed August 13, 1965 in (United's appeal, No. 15,626) as to damages and a new trial is awarded limited to damages in accordance with the opinion of this Court; the award of counsel fees in the amount of $600,000 for the services of Donovan Leisure Newton & Irvine and $50,000 for the services of Nogi, O'Malley & Harris is vacated for further proceedings in accordance with the opinion of this Court; and vacating the judgment of the District Court, filed August 13, 1965 in (Hanover's appeal, No. 15,627) so that the issue therein raised may be reconsidered as part of the retrial of damages. The amount of attorneys fees in the prosecution, briefing and argument of each of these appeals shall be determined by the District Court as part of the retrial of the issue of damages, and the costs on these appeals shall abide the ultimate decision in this action, filed. (Covers 15262/15627).

July 11 Notice of filing (on July 7, 1967) of petition for writ of certiorari, received from Clerk of Supreme Court, filed. (S. C. No. 335). (Covers 15626/15627).

July 11 Certificate of filing (on July 7, 1967) of petition for writ of certiorari, received from Clerk of Supreme Court, filed. (S. C. No. 335). (Covers 15626/15627).

Aug. 9 Notice of filing (on August 7, 1967) of petition for writ of certiorari, received from Clerk of Supreme Court, filed. (S. C. No. 463, O.T., 1967). (Covers 15626/7).

Oct. 14 Certified copy of order, dated October 9, 1967, received from Clerk of Supreme Court granting petition for writ of certiorari, consolidating this case with S. C. No. 463, allotting 2 hours for oral argument, etc., filed. (S. C. No. 335, O.T. 1967). (Covers 15626/15627).

Oct. 14 Certified copy of order, dated October 9, 1967, received from Clerk of Supreme Court granting petition for writ of certiorari, consolidating this case with S. C. No. 335, allotting 2 hours for oral argument, etc., filed. (S. C. No. 463, O.T. 1967). (Covers 15626/15627).

District Court of the United States

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action—File No. 5395

THE HANOVER SHOE, INC.,

Plaintiff,

—against—

UNITED SHOE MACHINERY CORPORATION,

Defendant.

Amended Complaint

Jurisdiction:

1. This action arises under Section 2 of the Act commonly known as the Sherman Act, 26 Stat. 209, U. S. C., Title 15, Sec. 2 and under Section 4 of the Act commonly known as the Clayton Act, 38 Stat. 731; U. S. C., Title 15, Section 15.

Parties:

2. The plaintiff, The Hanover Shoe, Inc., sometimes referred to hereinafter as Hanover, is a corporation organized and existing under the laws of the State of Pennsylvania and has its principal office and place of business at Hanover, Pennsylvania.

3. The defendant, United Shoe Machinery Corporation, sometimes referred to hereinafter as United, is a corporation organized and existing under the laws of the State

of New Jersey and has its principal office and place of business at 140 Federal Street, Boston, Massachusetts. The defendant also transacts business in the Middle District of Pennsylvania, having a place of business and offices at 20 South Fourth Street, Harrisburg, Pennsylvania, and may be found within said Middle District.

The Product and Commerce Involved:

4. Since 1899 United or its predecessor has been continuously engaged in the manufacture and distribution of shoe machinery. The principal part of such shoe machinery is manufactured at United's factory at Beverly, Massachusetts, and is distributed in interstate commerce to shoe manufacturers, including plaintiff. Shipments were made to plaintiff at its principal factory at Hanover, Pennsylvania, and at its other factories at Middletown and Emmitsburg, Maryland, and East Berlin, Pennsylvania.

5. Hanover is now and, since about 1901, has been engaged in the manufacture and sale of men's and boys' shoes. Most of the operations of importance in the making of these shoes are done by machine and Hanover cannot engage competitively in quantity production of such shoes without such shoe machinery.

6. The operations involved in the manufacture of men's and boys' shoes by Hanover and other shoe manufacturers are known as upper cutting, upper fitting, stock fitting, lasting, bottoming, making, finishing and treeing. These operations, briefly described below, are conducted in seven departments or rooms at the shoe factories of Hanover, as follows, and some or all of the United machine types listed

in paragraphs 7 through 13 below have been used by Hanover since 1912.

7. Cutting Room: Upper cutting is done in this room. This consists of cutting the various parts of the shoe upper and linings. The parts of the upper (such as vamps, quarters, tips, back stays and tongues) are usually cut out from leather and fabric by clicking machines and clicking dies. In addition to the shoe uppers, the linings are also cut. Uppers and linings are match-marked, sorted into pairs and stamped for size and case numbers, the latter being for factory identification throughout the remainder of the manufacturing process. The following United machines are now or were in the past used by Hanover in these operations:

Ideal Clicking, Model C
Ideal Twin Clicking, Model G

8. Fitting Room: Upper fitting is done in this room. This immediately follows the cutting operations. It includes a wide range of operations by means of which the separate parts of the upper and lining are prepared and assembled to make the completed shoe upper. The number and sequence of operations vary greatly and are in direct relation to the complexity of design and to the type of shoe being produced. If the shoes are eyeletted, a temporary thread lacing is inserted in the eyelet holes by a lacing machine. This is for the purpose of retaining the shoe shape during the subsequent operations. The following United machines are now or were in the past used by Hanover in these operations:

Edging, Model B
USMC Cementing, Model C

Duplex Eyeletting, Model B
USMC Eyeletting, Model C
USMC Tip Finishing, Model A
USMC Lacing, Model A
Goodyear Outsole Rapid Lockstitch, Model O
Pluma Skiving, Model O
USMC Skiving, Model A
Rapid Folding, Model J

9. Stock Fitting Room: Stock fitting is the preparation of bottom stock for the shoe. The principal shoe parts prepared are outsoles, insoles and platforms (which are cushioned insoles) but they may also include counters, box toes, heels and welting. The operations largely involve cutting and shaping the materials used, and applying adhesives or stiffeners to the various parts. The following United machines are now or were in the past used by Hanover in these operations:

Economy Insole Lip Cementing, Model C
Economy Insole Channeling, Model B
Automatic Heel Compressing, No. 6
Insole Lip Cutting & Scoring, Model E
Improved Gearless Sole Cutting, Model H
Planet Sole Rounding, Model E
Economy Insole Lip Setting, Model B
USMC Splitting, Models B and G
Power Welt Tacking
Insole Rib Cementing, Model A
Insole Rib Reinforcing, Model B

10. Lasting Room: Lasting is the series of operations by means of which the shoe upper and lining are drawn

tightly over the wood last on which the shoe is made, and fastened to the insole of the shoe. This operation causes the upper to conform to the shape of the last, imparting thereby the desired style and fit characteristic to the finished shoe. The work of lasting consists of positioning the insole, upper (including all lining materials), box toes and counters in correct relation to one another; in stretching the upper; and in fastening the entire structure together. The upper must be conformed to the last with a high degree of skill. The following United machines are now or were in the past used by Hanover in these operations:

Rex Assembling, Model H
USMC Celastic Conditioning
USMC Lasting, No. 7
USMC Heel Seat Lasting, Model E
USMC Staple Sidelasting, Model B
Rex Pulling Over, Model C
USMC Insole Tacking, No. 1
USMC Upper Trimming, Model J
USMC Toe Lasting, Model C

11: Goodyear Room: Bottoming and making are done in this room. Bottoming includes a series of operations by means of which the shoe bottom is prepared and the outsole is permanently attached to the lasted upper of the shoe and it may include some operations upon the outsole which are performed after attaching. Construction of the Goodyear Welt shoe requires that the welt be sewn on, the surplus upper material be removed (inseam trimming), the welt be beaten out flat and trimmed off and beveled at the heel breast line, and the outsole and welt be rough-rounded to approximately final shape. The final operation in bot-

toming generally is leveling, which is performed by machines which apply considerable pressure to the sole bottom either by means of a progressive roll or a matrix form. This operation compacts the shoe bottom and produces the desired smooth contours of the sole surface.

Making consists of the operations performed, after the outsole has been attached, that have to do with attaching the heel to the shoe, trimming the heel and the edges of the sole to the required contour, scouring the heels, setting the edges and staining and burnishing the heels.

The following United machines are now or were in the past used by Hanover in these bottoming and making operations:

Goodyear Welt Beating & Slashing
Goodyear Welt Indenting & Burnishing
Inseam Cementing, Model A
USMC Sole Cementing, Model C
Goodyear Universal Rounding & Channeling, Model E
USMC Fibre Fastening, Model B
Goodyear Automatic Sole Leveling, Model D
Goodyear Outsole Rapid Lockstitch, Model O
Loose Nailing, No. 2
Goodyear Stitch Separating, Model B
Goodyear Upper Stapling, Model B
USMC Inseam Trimming, Model C
Goodyear Rapid Bobbin Winding
Goodyear Welt Butting & Tacking, Model B
Goodyear Welt Sewing, Model K
Goodyear Inseam Sewing, Model B
Goodyear Welt Indenting & Burnishing, Model C

12. Finishing Room: Finishing is the giving of a thorough treatment to the entire shoe bottom surface to make it attractive in appearance and the heels (if wood) are permanently attached. The bottom treatment consists of a variable combination of operations according to quality and effects desired and includes buffing and the application of different finishes. The following United machines are now or were in the past used by Hanover in these operations:

McKay Automatic Heel Loading & Attaching, Model B
Crest Heel Blacking, Model C
USMC Jointing, Model G
Twin Edge Setting, Model D
Universal Slugging
USMC Edge Trimming, Model H
Heel Breast Scouring and Aligning, Model A
USMC Edge Trimming, Model L
USMC Twin Edge Setting, Model F

13. Treeing Room: Treeing is the operation in which the shoes are given their final treatment before being packed in boxes. The following United machine is used by Hanover in this operation:

USMC Embossing, Model G

The Violation of Law Complained of:

14. Prior to and continuously from the year 1912 the defendant, United Shoe Machinery Corporation, has been violating the antitrust laws of the United States, by:

(a) monopolizing interstate trade and commerce in the shoe machinery industry of the United States;

(b) monopolizing interstate trade and commerce of the United States in substantially all shoe machinery required and used by Hanover in the manufacture of men's and boys' shoes.

15. Monopolization by United as aforesaid and the exercise by it of its monopoly powers has enabled United to dominate and control the market in shoe machinery, to restrict actual competition and to exclude potential competition in said market.

The Principal Means Used to Accomplish the Violation of Law:

16. At all times prior to May 17, 1954, the date of the decision of the United States Supreme Court affirming a judgment that United violated Section 2 of the Sherman Act by monopolizing the shoe machinery trade and commerce among the several States, United declined to sell most of its shoe machines and made such machines available to shoe manufacturers only upon leases which reserved to United the sole and exclusive property in the machines and which granted to lessees the right to use the machines only for the purposes specified in the leases. At all times prior to said May 17, 1954, United offered on lease only all of the major, important machines used by Hanover in the operations described in paragraphs 7 through 13 above and listed in those paragraphs.

17. United's leases for most of its machines, including all such leases between United and Hanover, provided for the payment by shoe manufacturing lessees of flat rental charges or of so-called unit charges based upon the number of shoes upon which the machines were used or upon the

number of operations performed by the machines. Leases for the rest of its machines, including all such leases between United and Hanover, provided for the payment of both rental and unit charges. Where unit charge machines were adaptable for more than one kind of operation, separate charges were assessed by United for each kind of operation.

18. At all times prior to said May 17, 1954, all leases of United, including all leases entered into between United and Hanover, included the following provisions which, alone or in combination with one or more of the others, deter and prevent shoe manufacturing lessees, including Hanover, from replacing with a competitive machine each of the shoe machines leased from United.

(a) That the lessee shall use the machine for a fixed period of time, never less than 10 years, subject to renewal for a period of not less than five years; that upon the expiration of the original term or the renewal term, the leases provided that the machinery shall continue under the lease indefinitely subject to the right of United or the lessee to terminate the lease upon 60 days' notice. In practice United did not leave the machinery, subject to termination on 60 days' notice but required the execution of a further renewal lease;

(b) That the lessee of each unit charge machine shall use the machine to its full capacity upon all shoes made by the lessee upon which the machine is capable of being used;

(c) That the lessee of each unit charge machine shall use the machine each month upon a stipulated

minimum number of pairs of shoes, and shall pay to United a stipulated sum of money at the conclusion of each month during which the machine is not used upon said minimum number of pairs of shoes;

(d) That upon termination of the lease the lessee shall surrender the machine to United in good order and condition, shall reimburse United for the cost of all broken or missing parts, and shall pay to United a stipulated sum of money, called a deferred payment or return charge, varying in amount according to the machine leased from about 30% to 40% of the manufacturing cost plus the developmental cost of the machine type, although there is no fixed formula by which the amount is determined.

19. Beginning January 1, 1923, United, by written notice to its lessees established a plan whereby a stated percentage (2% from January 1, 1923, increased to 3% beginning February 1, 1927 and to 4% beginning August 1, 1939) of all unit charges, rentals and minimum charges on a machine were set aside by United to the credit of the lessee solely for the purpose of being applied by the lessee, if the lessee desired, to deferred (or return) payments and, since 1939, to payments for use of the machine less than minimum that might be due or become due under the terms of the lease on that machine or on other machines under lease in the factory. The amount so set aside by United to the credit of the lessee is commonly known as the "right of deduction fund."

20. In the event that any lessee, including Hanover, has desired to return a United machine to be replaced with another United machine, United permits such return upon

payment by the lessee, as required under United's leases, of the cost of transportation of such machine to United at Beverley, Massachusetts, the cost of replacement of all broken or missing parts at the regular prices established by United therefor and the return charge established for such machine in the lease. Where a lessee, including Hanover, wished to return a United machine solely to replace it with a competitor's machine, United permits the return only on the payment, in addition to the items just stated, of an adjustment or commutation of sums that would have accrued thereafter which is calculated, in the case of a machine leased without any unit charge, at 25% of the monthly rentals payable for the balance of the term and, as to a machine leased in whole or in part on the basis of unit charges, at 50% of the minimum monthly payment for the balance of the term after the waiver of four months for each of the remaining years of the term; that these charges are, at the lessee's option, payable in cash or charged against the right of deduction fund.

21. Although not required to do so by its leases, United has at all times undertaken to repair its machines without extra charge to the lessee except for such parts as are required. As a result no independent repair or service organizations have been able to grow up, and potential or existing competitors of United in the manufacture of shoe machinery must either offer repair service with their machines or suffer the competitive disadvantage of marketing machines to shoe manufacturers, all of whom know that repair service will be difficult to provide.

22. As a further means of preventing competition, excluding competitors and expanding its share of the market,

United has, where faced with competition in the marketing of one or more types of shoe machinery made by it, adopted, among others, the following practices:

(a) Reduced its own rates on the machinery type or types threatened by competition;

(b) Introduced new models at lower rates than for comparable old models;

(c) Maintained rates on a particular machine type despite a policy of increasing rates on other machine types to meet increased costs of manufacture;

(d) Introduced new models so designed and priced as to reach only that area of the shoe manufacturing industry in which a competitor is attempting to market a machine.

Extent of United's Monopoly and Control of Market:

23. By means of the unlawful conduct hereinbefore described, United has placed in shoe factories most of the shoe machinery used in the manufacture of shoes in the United States. United supplies from 75% to 100% of almost all of the different types of shoe machinery used in the United States, exclusive of dry thread sewing machinery.

24. The following types of shoe machinery (more particulary identified in paragraphs 7 through 13 above) are required by Hanover in the manufacture of men's and boys' shoes and are or have been leased by Hanover from United. United supplied approximately the following percentages of

the total of all such machines in American shoe factories about May 1, 1947:

Machine Types	United's Share of Total Shoe Machinery in Shoe Factories in the United States as of about May 1, 1947
Clicking	97%
Eyeletting	81%
Cutting Press (Dinking)	91%
Pulling Over	99%
Lasting	
Heel Seat Lasting	99%
Staple Side Lasting	99%
Bed Lasting	99%
Welt Toe Lasting	100%
Inseam Trimming	99%
Welt Sewing	97%
Rough Rounding	98%
Outsole Stitching	92%
Loose Nailing	98%
Outsole Leveling	97%
Fibre Fastening	100%
Heel Attaching	98%
Slugging	91%
Fitting Room Department	
Skiving	80%
Folding	62%
Upper Cementing	57%
Lacing	99%
Edging	100%
Tip Finishing	99%

Machine Types	United's Share of Total Shoe Machinery in Shoe Factories in the United States as of about May 1, 1947
General Department	
Edge Trimming	88%
Edge Setting	90%
Sole Leather Splitting	82%
Cementing	83%
Sole Rounding	100%
Heel Blacking	100%
Jointing	100%
Insole Lip Cutting and Scoring	97%
Goodyear Department	
Insole Channeling	99%
Rib Reinforcing	93%
Bobbin Winding	98%
Welt Beating & Slashing	99%
Lip Turning & Setting	99%
Lip Cementing	99%
Welt Butting	100%
Upper Stapling	98%
Rib Cementing	98%
Heeling Department	
Heel Compressing	89%
Lasting Department	
Insole Tacking	99%
Pulling Over Department	
Assembling	100%
Celastic Conditioning	99%
Upper Trimming	98%

Effects of United's Monopoly:

25. The aforesaid practices and conduct of United, its monopolization of interstate commerce in shoe machinery,

the restriction of existing competition and exclusion of potential competition in the manufacture, leasing and sale of shoe machinery has had the following effects on Hanover:

(a) United has collected from Hanover excessive, arbitrary and non-competitive rental, unit and other charges for its products and services;

(b) Hanover has been prevented from acquiring shoe machinery, new or used, as owner either from United or elsewhere;

(c) United has extracted from Hanover for the use of its shoe machinery, large sums of money in excess of the reasonable value of such machinery and of the service rendered by United on such machinery.

26. As a result of the foregoing monopolization in violation of the antitrust laws and as a result of the acts done in furtherance of such monopolization, Hanover has been damaged in the amount of $1,750,000.

WHEREFORE, plaintiff asks that judgment be entered against the defendant hereinabove named in the amount of $5,250,000, being three times the actual damage suffered by plaintiff and that in addition plaintiff recover a reasonable attorney's fee and costs as provided by statute.

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Second Amended Answer to Amended Complaint

DISTRICT COURT OF THE UNITED STATES

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[SAME TITLE]

Defendant by its attorneys Davis Polk Wardwell Sunderland & Kiendl for its second amended answer to the amended complaint:

1. Is without knowledge as to the truth of paragraph 5 thereof except that defendant admits that plaintiff is not and was not able to engage competitively in the quantity production of men's and boys' shoes without shoe machinery.

2. Is without knowledge as to the truth of paragraph 6 except it admits (a) that the operations used in the manufacture of men's and boys' shoes are by shoe manufacturers generally grouped under the descriptions in said paragraph and (b) that some or all of the United machine types listed in paragraphs 7 through 13 thereof have been used by Hanover since 1939 at least.

3. Is without knowledge as to the truth of paragraphs 7 to 13 thereof inclusive except it admits (a) that the operations described in those paragraphs are generally performed in the manufacture of shoes and in the departments so designated and (b) that one or more United machines of the types referred to in said paragraphs are now or were in the past leased by Hanover from defendant.

4. Denies paragraphs 14, 15, 22, 23, 25 and 26 thereof.

5. Denies paragraph 16 thereof except it admits (a) that before 1955 it was the practice of defendant to offer for lease only 37 out of the 47 machine types listed in paragraphs 7 to 13 thereof while offering 10 of said 47 machine types either for lease or for purchase at the customer's option and (b) that under its leases the leased machinery remained the sole and exclusive property of the defendant with the right in the lessee to use the same upon the conditions contained in the lease.

6. Denies paragraph 18 thereof except it admits that at all relevant times defendant made with plaintiff and others leases substantially in the form annexed as Exhibit A to defendant's answer dated May 2 1956 to the original complaint and that renewal leases were executed for a five-year term, which terms and conditions have at all times been the same for all lessees of defendant.

7. Denies paragraph 19 thereof except it admits that, beginning January 1 1923, by written notice to its lessees defendant established a plan under which there would be applied by United, unless the lessee elects otherwise, a stated percentage (2% from January 1 1923, increased to 3% beginning February 1 1927 and 4% beginning August 1 1939) of all unit charges, rentals and minimum charges received by defendant in respect of a machine, to liquidation of any deferred (or return) payments for which the lessee became obligated and, since 1939, to the payments for use of the machine less the minimum that might be due or become due under the terms of the lease on that

machine or on other machines under lease in the factory. The amount available for such application on the lessee's election and instructions is commonly known as the "Right of Deduction Fund".

8. Denies paragraph 20 thereof except it admits that at all relevant times it has accepted the return of each machine which a lessee has desired to return even though the contract term of the applicable lease has not expired; that where return before expiration of the contract term of the lease has been desired by the lessee either because the operation performed by the machine is no longer to be used or is to be performed by hand or by another machine of defendant, either newly or previously leased, or because the defendant's machine does not successfully perform the operation which can be successfully performed by a machine of other manufacture or because the lessee is ceasing to do business, in each such case the return has been accepted upon payment by the lessee of the cost of broken and missing parts, the deferred payment, if any, and the cost of transportation to defendant's factory at Beverly, Massachusetts, all as provided in the lease; that where return of the machine before expiration of the contract term of the lease has been desired by the lessee solely for the purpose of substituting in performance of the operation a machine of other manufacture, in each such case the return has been accepted on payment of an additional sum amounting, in the case of a monthly rental machine, to 25% of the monthly rentals for the unexpired term of the lease; or, in the case of a unit charge machine, to 50% of two-thirds of the aggregate minimum monthly charges for the unexpired term of the lease; or, in the case of a machine leased upon monthly rental and unit charge (with

no provision for minimum monthly charges), to 50% of the aggregate monthly rentals for the unexpired term of the leases and that in each such case the lessee was entitled at his election to cause any amount available under the plan known as the Right of Deduction Fund to be applied to discharge in whole or in part the obligation of the lessee to make to the defendant the deferred payment, if any, provided in the lease.

9. Denies paragraph 21 thereof except it admits that defendant has at all relevant times undertaken to repair its machines on lease with plaintiff and with other lessees without extra charge to the lessee except for such parts as are required and in addition to this repair service has rendered planning, shoe-making and other services to plaintiff without charge, all of which services plaintiff has received and accepted and on occasions requested.

10. Denies paragraph 24 thereof except it admits machines of the types listed in paragraphs 7 to 13 thereof are required in plaintiff's manufacture of men's and boys' shoes and are or have been leased by plaintiff from defendant; and admits for the purposes of this case only that the information available to United, known to be incomplete and inaccurate, with respect to use by shoe manufacturers as of about May 1 1947 of machines of the first 17 types listed therein, each first developed, introduced and distributed to shoe manufacturers by defendant and progressively improved by defendant since its introduction, indicates that the percentages therein alleged as being the proportion of all machines then used by shoe manufacturers for the operations performed by such machine types, respectively, represented by machines of defendant's types and

manufacture are approximate within limits rendering inaccuracies probably immaterial for the purposes of this case.

FOR A FIRST DEFENSE

11. Says that plaintiff's claims did not accrue within the time limited for action, and are barred by the Massachusetts one-year statute of limitations governing actions for penalties or forfeitures under penal statutes (Mass. G. L. Ch. 260 § 5) as made applicable to this case by the statutes of Pennsylvania (12 Purdon's Statutes § 39).

FOR A SECOND AND PARTIAL DEFENSE

12. Says that all plaintiff's claims for the period prior to July 1 1939 did not accrue within the time limited for action and are barred by the Pennsylvania six-year statute of limitations.

FOR A THIRD DEFENSE

13. Says that such pre-eminence as defendant has or has had in the shoe machinery industry has been due to its initiative, enterprise, research, experience, knowledge and development of superior products and of business methods adapted to promote entrance into business and competitive success of plaintiff and shoe manufacturers generally, and such pre-eminence has been accompanied by an increase rather than a diminution of competitive opportunity for plaintiff.

FOR A FOURTH DEFENSE

14. Says that the right of action, if any, set forth in the complaint is barred by laches, estoppel, waiver and acquiescence on the part of the plaintiff.

WHEREFORE defendant prays for judgment dismissing the complaint on the merits together with costs and disbursements of this action.

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February 24 1961

FINDINGS OF FACT, CONCLUSIONS OF LAW AND OPINION

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[SAME TITLE]

I.

INTRODUCTION

This is a private antitrust action which arises under Section 2 of the Sherman Act, Act of July 2, 1890, c. 647, 26 Stat. 209, as amended, 15 U. S. C. A. § 2, and under Section 4 of the Clayton Act, Act of October 15, 1914, c. 323, 38 Stat. 731, 15 U. S. C. A. § 15, to recover treble damages for defendant's alleged monopolization of the shoe machinery industry, and, particularly, its alleged monopolistic practices with respect to substantially all shoe machinery required and used by plaintiff, The Hanover Shoe, Inc. (Hanover).

The complaint, as amended, alleges in paragraph 14 that "Prior to and continuously from the year 1912 the defendant, United Shoe Machinery Corporation [United], has been violating the antitrust laws of the United States by: (a) monopolizing interstate trade and commerce in the shoe machinery industry of the United States; (b) monopolizing interstate trade and commerce of the United States in "substantially all shoe machinery required and used by Hanover in the manufacture of men's and boys' shoes." In paragraph 15 it is alleged that "Monopoliza-

tion by United as aforesaid and the exercise by it of its monopoly powers has enabled United to dominate and control the market in shoe machinery, to restrict actual competition and to exclude potential competition in said market."

The complaint then sets forth allegations with respect to the principal means used by United to accomplish the violation of law. It is alleged that "At all times prior to May 17, 1954, the date of the decision of the United States Supreme Court affirming a judgment that United violated Section 2 of the Sherman Act by monopolizing the shoe machinery trade and commerce among the several States, United declined to sell most of its shoe machines and made such machines available to shoe manufacturers only upon leases . . ." and that United "offered on lease only all of the major, important machines used by Hanover" in the shoe manufacturing operations described in other paragraphs of the complaint. It is alleged that United's leases for most of its machines, including all such leases with Hanover, provided flat rental charges or unit rental charges based on the number of shoes produced or on the number of operations performed by the machines, and on the rest of its machines, including those on lease to Hanover, provided for payment of both rental and unit charges. It is alleged that in these leases, the 10 year term, full capacity, minimum charge, and machine return clauses, alone or in combination with one or more of the other clauses, deter and prevent shoe manufacturing lessees, including Hanover, from replacing with a competitive machine each of the machines leased from United.

Other means used by United to deter competition are alleged to be the establishment of a "right of deduction fund" whereby a percentage of rentals was set aside by

United to be applied by United, if desired by the lessee, to machine return charges or minimum rental charges; the requirement that lessees pay transportation and parts replacement costs, and a sum equaling either 25 or 50 percent of the remaining rental for the term if a lessee, including Hanover, desired to replace a United machine with that of a United competitor; and United's voluntary assumption of machine repair with no separate charge to the lessee, thereby deterring the establishment and growth of competitive repair service organizations. The complaint alleges that as a further means of preventing competition, United, when faced with competition, reduced its own rates on machinery types threatened by competition; introduced new models at lower rates than those rates for comparable old models; maintained rates on a particular machine type despite a policy of increasing rates on other machine types to meet increased costs of manufacture; and introduced new models so designed and priced as to reach only that area of the shoe manufacturing industry in which a competitor was attempting to market a machine.

Hanover alleges that these practices affected it in the following ways: (a) United collected from Hanover excessive, arbitrary and non-competitive rental, unit and other charges for its products and services; (b) Hanover was prevented from acquiring shoe machinery, new or used, as owner either from United or elsewhere; (c) United extracted from Hanover for the use of its shoe machinery, large sums of money in excess of the reasonable value of such machinery and of the service rendered by United on such machinery.

Hanover claims damages of $2,000,000, and pursuant to the treble damage provisions of the Clayton Act, requests judgment of $6,000,000.

In its answer United denied many of the significant allegations of the complaint and set up as affirmative defenses the statute of limitations, laches, estoppel, waiver and acquiescence on the part of Hanover. United also contends that its pre-eminence in the shoe machinery industry is due to its initiative and enterprise and its business methods, which were adopted to promote success of manufacturers generally, and has been accompanied by an increase of opportunity for Hanover.

The action was tried to the court without a jury.

II.

Findings of Fact, Conclusions of Law

A. Background:

Plaintiff, The Hanover Shoe, Inc., is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal office and place of business in Hanover, Pennsylvania.

Defendant, United Shoe Machinery Corporation, is a corporation organized and existing under the laws of the State of New Jersey, with its principal office and place of business in Boston, Massachusetts, and also with offices and a place of business in Harrisburg, Pennsylvania, within this district.

Since 1899 Hanover has engaged in the manufacture of men's shoes by the Goodyear welt process, and until the early 1950's also engaged in the manufacture of boys' shoes by the same process. Except for large quantities of military shoes manufactured during World War II, and for shoes sold to Montgomery Ward and J. C. Penney since World War II, Hanover has sold the shoes it manufactured di-

rectly through retail men's shoe stores operated by its wholly owned subsidiary, Sheppard & Myers, Inc. There are currently about 110 retail stores, Hanover's manufacture of shoes during the period from 1939, the beginning of the complaint period of this action, to 1955, the year in which the action was instituted, ranged in volume from a low of 1,006,768 pairs in 1939 to a high of 1,939,289 pairs in 1944. In 1955 Hanover was one of the 35 largest of approximately 1,000 shoe manufacturers in the United States.

Until 1956 all of the capital stock of Hanover was owned by or for the benefit of H. D. Sheppard or C. N. Myers, the original shareholders, or members of their families, except for small blocks of stock sold to key employees, beginning in 1940. In 1956 approximately 25 percent of the then outstanding capital stock was sold to the public.

United is the successor of a combination of shoe machinery companies which consolidated in 1899. Since that time United has engaged in the manufacture and distribution of shoe machinery. Most of the machinery was manufactured at its factory in Beverly, Massachusetts, and was distributed in interstate commerce to shoe manufacturers, which included machinery supplied to Hanover at its principal plant in Hanover, Pennsylvania, and at its other factories in East Berlin, Pennsylvania, and Middletown and Emmitsburg, Maryland.

Most of the important operations in Hanover's manufacture of shoes are done by machine, and Hanover could not engage competitively in quantity production without the use of shoe machinery.

During the complaint period United made available its more complicated machines to shoe manufacturers, includ-

ing Hanover, on leases only. The more complicated machines are those which have greater importance in the manufacture of shoes. These machines produced the largest revenue for United. In 1951 United had 178 machine types on a lease-only basis. The complaint in this action relates to United's practices with respect to 58 such machine types which Hanover had on lease during the complaint period. The rental for these machines was either a stated amount, a stated amount plus royalties, or royalties only, payable monthly. Of the 58 machine types, 20 accounted for more than 80 percent of the rentals and royalties paid United by Hanover during the complaint period, and 18 of the 20 types were on a royalty or royalty plus rental basis.

United also marketed machines less complicated than the major machines, on an alternate lease or sale basis, at the customer's option. In 1951 United had 122 of these machine types, hereafter referred to as optional machines. The rental for these machines was on a flat rate basis, payable monthly.

In 1951 United had 42 machine types available for purchase only.

All new leases to shoe manufacturers, including Hanover, of machinery involved in this action were for 10 year terms. Renewal leases were for 5 years. From 1922 to May 17, 1954, all of United's leases were substantially uniform. They are known as "Form A" leases. Three clauses important to this action are the full capacity, term, and return charge.[1] A fourth clause, Clause 2, provided, among other

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[1] "Machine Use 5. The leased machinery shall be used for no other purpose than for performing the operations for which it is designed in the manufacture of boots, shoes or other footwear made by or for the lessee. Subject to the foregoing limitations, the lessee shall use the leased machinery to its full capacity upon

things, that the lessee shall at all times and at his own expense keep the machinery in good and efficient working order, and in the event that the lessee shall fail to do so, United may cause the machinery to be put in such order at the expense of the lessee.[2]

"Full Capacity" all boots, shoes or other footwear or portions thereof made by or for the lessee in the manufacture or preparation of which such machinery is capable of being used, and the provision herein contained shall not be construed to be limited in any way by the number of pairs designated in Column VI in the foregoing Schedule of Machines.

"

. . .

"Term of Lease" 12. The lease hereby granted in respect to each machine hereby leased shall continue, unless sooner terminated by the United Corporation because of breach thereof on the part of the lessee or otherwise as herein provided, for the period of ten years from the date hereof.

. . .

"

. . .

"Return of Machines" 14. Upon the termination in any manner whatever of the lease hereby granted or any extension thereof in respect to any machine hereby leased the lessee shall forthwith deliver such machine to the United Corporation, at Beverly, Massachusetts, complete and in good order and condition, reasonable wear and tear alone excepted, and shall pay to the United Corporation in respect to each such machine the amount (if any) "Payment" set opposite the name thereof in column VII in the foregoing Schedule of Machines. The lessee shall also pay to the United Corporation such sum as may be necessary to cover replacement at the regular prices established by the United Corporation therefor of all broken or missing parts.".

The complaint also sets forth the monthly minimum charge on unit charge machine clause as a means whereby United monopolized the shoe machinery industry to the detriment of lessees, including Hanover. In its brief and proposed findings of fact and conclusions of law, however, Hanover did not point to this clause as a means of monopolization.

[2]It is the conduct of United under this clause, rather than the clause itself, that Judge Wyzanski found to be a means by which United controlled the shoe machinery market.

In 1947 the United States instituted a civil action against United in the United States District Court for the District of Massachusetts, Civil Action No. 7198, alleging violations of Sections 1 and 2 of the Sherman Act, 15 U. S. C. A. §§ 1 and 2. On February 18, 1953, Judge Wyzanski handed down findings of fact, conclusions of law, opinions, and a decree which found that United violated Section 2 of the Sherman Act. United States v. United Shoe Machinery Corporation, D. Mass. 1953, 110 F. Supp. 295. On May 17, 1954, the Supreme Court of the United States affirmed per curiam the judgment of the District Court. 347 U. S. 521. This action will hereinafter be referred to as the Government case.

B. United's Market Position:

As of about May, 1947, United's share of the market of 56 of the 58 lease-only machine types leased by Hanover —there being no data in evidence as to the remaining two— was as follows:

100%	—	10 types
99%	—	14 types
98%	—	7 types
97%	—	4 types
96%	—	5 types
90-95%	—	9 types
85-89%	—	1 type
80-84%	—	3 types
55-69%	—	3 types
		56

Of the 20 major machine types included in the 56, the rentals and royalties of which accounted for more than

80 percent of the charges Hanover paid United, United's market share was:

100%	—	4 types
99%	—	6 types
98%	—	4 types
97%	—	3 types
89-93%	—	3 types
		20

There is no evidence that United suffered any appreciable limitation in its share of the market with respect to these machine types prior to the filing of the complaint. With respect to domestic machines, there is no evidence of any change whatever. As to foreign machines, a tabulation for 23 machine types, 15 of which are comparable in function, with United's machines leased by Hanover, shows that 538 machines were installed in factories since January 1, 1947, and 403 of these were outstanding on August 1, 1955. On May 1, 1947, United had 115,787 machines outstanding. Since January 1, 1947, there have been 323 installations of the 15 types Hanover leased from United, of which 104 were clickers. On August 1, 1955, 233 were outstanding, of which 86 were clickers. The influence that these machines had on the dominance of United's position is inconsequential. Until 1955 United enjoyed an overwhelming share of the shoe machinery market which it controlled.

C. The Antitrust Violation:

1. The Findings and Decree in the Government case.

Hanover relies primarily on the decree, findings, conclusions, and opinions in the Government case, as proof of United's illegal monopolization of the shoe machinery in-

dustry in the United States, pursuant to Section 5 of the Clayton Act, 15 U. S. C. A. § 16, which provides:

> "(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: . . ."

United urges that even with the aid of the decree in the Government case, Hanover has not proved a monopolization; that the four clauses in the Form A lease, the ten year term, the full capacity, the deferred payment or return charge, and the repair clause, were the only factors relied on by Judge Wyzanski as the basis of his decree; that these clauses were not in their actual operation restrictive or monopolizing practices, and had no effect on Hanover; and that all other charges were dismissed with prejudice.

The findings, conclusions and decree in the Government case show that the four clauses of the Form A lease, and also the lease-only system were in their operation restrictive or monopolizing practices.[3]

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[3]The court clearly indicated this in the following parts of its opinion (page numbers refer to 110 F. Supp.).

"The effect of United's leasing system as it works in practice may be examined from the viewpoints of United, of the shoe manufacturers, and of competitors potential or actual. p. 323

"Yet as already noted, a shoe manufacturer may psychologically or economically be more impeded by a leasing than by a selling system.

The court spoke of the lease-only system, and its "features" which have a "special deterrent effect"; the lease-

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And this general observation is buttressed by a study of features in the United leasing system which have a special deterrent effect. Though these features are stated separately, and some of them alone are important impediments, they must be appraised collectively to appreciate the full deterrent effect. p. 324

"However, United's leases, in the context of the present shoe machinery market, have created barriers to the entry by competitors into the shoe machinery field. p. 340

"First, the complex of obligations and rights accruing under United's leasing system in operation deter a shoe manufacturer from disposing of a United machine and acquiring a competitor's machine. He is deterred more than if he owned that same United machine, or if he held it on a short lease carrying simple rental provisions and a reasonable charge for cancellation before the end of the term. The lessee is now held closely to United by the combined effect of the 10 year term, the requirement that if he has work available he must use the machine to full capacity, and by the return charge which can in practice, through the right of deduction fund, be reduced to insignificance if he keeps this and other United machines to the end of the periods for which he leased them. p. 340

"Second, when a lessee desires to replace a United machine, United gives him more favorable terms if the replacement is by another United machine than if it is by a competitive machine. p. 340

"Third, United's practice of offering to repair, without separate charges, its leased machines, has had the effect that there are no independent service organizations to repair complicated machines. In turn, this has had the effect that the manufacturer of a complicated machine must either offer repair service with his machine, or must face the obstacle of marketing his machine to customers who know that repair service will be difficult to provide. p. 340

"If the matter were *res integra*, this Court would adopt the first approach, and, as a preliminary step to ruling upon § 2, would hold that it is a restraint of trade under § 1 for a company having an overwhelming share of the market, to distribute its more important products only by leases which have provisions that go beyond assuring prompt, periodic payments of rentals, which are not terminable cheaply, which involve discrimination against competition, and which combine in one contract the right to use the product and to have it serviced. p. 343

". . . In the relatively static shoe machinery market where there are no sudden changes in the style of machines or in the volume of

only system and the "complex of obligations and rights", accruing thereunder which "in operation" deter a shoe manufacturer from disposing of United's and acquiring a

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demand, United has a network of long-term, complicated leases with over 90% of the shoe factories. These leases assure closer and more frequent contacts between United and its customers than would exist if United were a seller and its customers were buyers. Beyond this general quality, these leases are so drawn and so applied as to strengthen United's powers to exclude competitors. . . . p. 343

". . . These considerations would all affect *potential* competition, and have not been without their effect on *actual* competition. p. 344

"Much of United's market power is traceable to the magnetic ties inherent in its system of leasing, and not selling, its more important machines. The lease-only system of distributing complicated machines has many 'partnership' aspects, and it has exclusionary features such as the 10-year term, the full capacity clause, the return charges, and the failure to segregate service charges from machine charges. Moreover, the leasing system has aided United in maintaining a pricing system which discriminates between machine types. p. 344

". . . the leasing system and the miscellaneous activities just referred to . . . are contracts, arrangements, and policies which, instead of encouraging competition based on pure merit, further the dominance of a particular firm. In this sense, they are unnatural barriers; they unnecessarily exclude actual and potential competition; they restrict a free market. . . . pp. 344-5

". . . United is denied the right to exercise effective control of the market by business policies that are not the inevitable consequences of its capacities or its natural advantages. That those policies are not immoral is irrevelant. . . . p. 345

". . . Defendant intended to engage in the leasing practices and pricing policies which maintained its market power. That is all the intent which the law requires when both the complaint and the judgment rest on a charge of 'monopolizing', not merely 'attempting to monopolize'. Defendant having willed the means, has willed the end. . . . p. 346

" . . . All that this opinion has ruled is that when control of the market has been obtained in large part by such leases, the market power cannot be said to have been thrust upon its holder through its own skill, energy, and initiative, or through technological conditions of production and distribution, or the inevitable characteristics of the market. . . ." p. 346

competitor's machine; the distribution of machines only on leases which "assure closer and more frequent contacts" with customers than if United were a seller, and "beyond this general quality" the four clauses which are "so drawn and applied" as to "exclude competitors" were the business policies with a deterrent effect; the business policies which erected "barriers" to competition and were traceable to the "lease-only system", and its "partnership aspects" and "exclusionary features". The court found that United intended to engage in leasing practices and pricing policies which maintained its market power and in so doing monopolized.

The conclusion is buttressed by the part of the opinion dealing with remedy. In discussing the remedies and their effects, the court clearly indicated that the lease-only system, restrictive clauses and related practices were the policies to be banned.[4]

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[4] "From the opinion on defendant's violations it follows that some form of relief regarding defendant's leases and leasing practices is proper and necessary. p. 348

". . . the Court agrees with the Government that the leases should be purged of their restrictive features. In the decree filed herewith, the term of the lease is shortened, the full capacity clause is eliminated, the discriminatory commutative charges are removed, and United is required to segregate its charges for machines from its charges for repair service. . . . p. 349

"The Court also agrees with the Government that if United chooses to continue to lease any machine type, it must offer that type of machine also for sale. The principal merit of this proposal does not lie in its primary impact, that is, in its effect in widening the choices open to owners of shoe factories. For present purposes it may be assumed that the anti-trust laws are not designed, chiefly, if at all, to give a customer choice as to the selling methods by which his supplier offers that supplier's own products. The merit of the Government's proposal is in its secondary impact. Insofar as United's machines are sold rather than leased, they will ultimately, in many cases, reach a second-hand market. From that market, United will

The decree effectuated the court's intent as expressed in the opinion. After holding that United monopolized the shoe machinery trade and commerce among the several states, in violation of § 2 of the Sherman Act, the court enjoined United from using the lease-only system and purged the leases of the restrictive effects of the four clauses.

If the lease-only system was not a monopolistic practice by the aid of which United maintained its monopolistic position, it would have been unnecessary for the court to order its cessation since it is a practice which could exist independent of the other lease provisions and practices. The complaint in the Government case, the court's summarization of the charges in the complaint, the findings and opinions, and the decree show that the charges which were dismissed with prejudice related to certain charges of monopolizing and attempting to monopolize in certain areas other than shoe machinery.

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face a type of substitute competition which will gradually weaken the prohibited market power which it now exercises. Moreover, from that market, or from United itself, a competitor of United can acquire a United machine in order to study it, to copy its unpatented features, and to experiment with improvements in, or alterations of, the machine. Thus, in another and more direct way, United's market power will be diminished. p. 349

"Furthermore, the creation of a sales market together with the purging of the restrictive features of the leases will, in combination, gradually diminish the magnetic hold now exercised by what United properly describes as the partnership features of the leasing system. As United's relationships with its customers grow feebler, competitors will have an enhanced opportunity to market their wares. p. 350.

". . . It has used its leases to monopolize the shoe machinery market. And if leasing continues without an alternative sales system, United will still be able to monopolize that market. To root out monopolization and to bring United, in the future, in the same class as its competitors, it is necessary not merely to place limitations upon United's leases, but also to require United to offer for sale any machine type which it leases. . . ." p. 350.

United advances several reasons why the four "Form A" clauses had no effect on Hanover.

Full Capacity. One argument is that Judge Wyzanski held this clause to be a "deterrent" to competition on the basis of certain testimony[5] by United's president in which the witness merely adopted that word as used by the court, and to which the court gave unwarranted weight. United offered previous testimony by the same witness in the Government case to show that the witness may have thought that the court was using "deterrent" as applicable to past general practice, particularly since the testimony in the instant case shows that the full capacity clause was never enforced since the early 1940's.

Judge Wyzanski, after reviewing instances when the full capacity clause was invoked, found that this clause and other clauses were invoked in accepting returns of machines before the lease terminated, or in billing lessees for

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[5]"The Court: If I have understood your answer correctly, you said that the full capacity clause operates as a deterrent to a factory taking on a competitor's machine, and it is a deterrent which the factory owner is not always aware of when he signs the lease. Have I misinterpreted your answer?

"The Witness: No, I think that is quite true. Very often they are not fully aware of the full capacity clause, or the way in which the obligation would devolve upon them.

"Q. Well, what I want to make clear is that even in the case where you have done that, have you told him that he couldn't return your machine. A. No, sir. On the contrary, we have gone to great lengths in most instances, and our branches I believe do so in all cases, because he has three alternatives, of course. He may return the machine if he wishes to, upon the basis I have outlined previously. If he wants to retain the machine, then we expect him to live up to the full capacity obligation in the lease; that is, that he will use the machine to full capacity.

"Q. And that is when he has work for it to do? A. That is right. Or if he wishes to use the other machine and not use ours, we expect that payment will still be made to us, of course, under the full capacity clause." (United's Exhibit 107)

machine use, if the lessee desired to use a non-United machine in place of the United machine, whereas these clauses were not invoked if the lessee had some other reason for returning a United machine or for non-use of the United machine. Judge Wyzanski concluded that this "discrimination is designed to operate, and does operate as, a method of excluding from the shoe factories shoe machinery competitive with United." Having so concluded, the court added: "If this were otherwise doubtful, this finding is confirmed by the statement in court of United's president 'that the full capacity clause operates as a deterrent to a factory taking on a competitor's machine.'" Thus, the court reached its conclusion after a review of evidence other than the president's testimony.

Moreover, United's president was advised by counsel that his answers were to apply to the past as well as the present: "And if I ask you questions in the present tense, I also mean them to apply to the general practice in the past tense as long as you have been familiar with the matter, Mr. Brown."

United also argues that the president's adoption of "deterrent" is negatived by a previous question and his answer: "Has it ever been the practice of your company to invoke this full capacity clause to deter or prevent any of your lessees from replacing a machine which you have leased to him with a competitive machine? A. Never." United's president was then asked to explain why the "clause does not have that operation." He answered that a lessee may at any time install a non-United machine if the lessee uses the United machine to full capacity. This explanation is no more than a description of the lessee's rights under the lease. Sanctions under the full capacity clause could not be imposed, no matter what machinery was being

used, if the United machine was being used to full capacity. Thus, any adoption of "deterrent" was not negatived by previous testimony.

United points to the testimony of Messrs. Sheppard of Hanover, Mills of Endicott Johnson Corporation, Erb of Melville Shoe Company, and Jones of Commonwealth Shoe Company that the full capacity clause was never enforced against these companies, and in the case of Mr. Erb, that the existence of the clause did not prevent his company from installing a competitive machine. The relevance of this testimony, for the most part, is not apparent. Judge Wyzanski found that the full capacity clause was not considered by United to have been violated unless the lessee failed to use the machine on work for which the machine was capable of being used, and instead performed such work by using a competitor's machine. Judge Wyzanski said: "In other words, it is not treated as a violation if the lessee fails to use United's machines because he performs the work by hand, or because he discontinues the type of operation for which the machine is capable of being used." The evidence of non-enforcement and that in certain instances shoe manufacturers were not prevented from installing non-United machines would be meaningful if there was also evidence that use of a competitor's machine caused the United machine to be operated at less than full capacity. There was no such evidence.

Finally, United argues that the uncontroverted testimony is that the full capacity clause has not been enforced since the early 1940's. This testimony was given by one of United's employees, who stated that since 1942 no attempt was made to enforce the clause because of the administrative difficulties involved. It is not clear as to whether this was intended to be a "company wide" or "location" aban-

donment of enforcement of the clause. But assuming it was a company wide policy, the full capacity clause was not deleted from the leases, and the company's intention to abandon enforcement was not otherwise communicated to the lessees. In the absence of such communication, the lessee would expect enforcement of the clause.

Return Charge. United relies on testimony by Messrs. Sheppard, Erb, Jones and Mills that the return charge in no way prevented them from returning a United machine, either for replacement by a competitive machine or for any other reason. Mr. Sheppard's testimony dealt with the return of United machines because they were surplus, or in exchange for other or new United machines, and was not concerned with the return of United machines to be replaced by non-United machines. The other three witnesses testified the return charge did not prevent the return of United machines for replacement by non-United machines because they had accumulated substantial credit under United's "Right of Deduction Fund",[6] which would offset machine return charges. This testimony does not overcome Judge Wyzanski's finding that this clause was a deterrent or monopolizing practice. Judge Wyzanski found that the right of deduction fund was an informal policy which United had not expressly committed itself to continue, and that discriminatorily higher charges were assessed if a machine was

[6]The Right of Deduction Fund is a plan, not part of the leases, but established by United in written notices to lessees, whereby (since 1939) 4 percent of all unit charges, rentals, and minimum charges on a machine is credited to the lessee. The credit is solely for the purpose of being applied, if the lessee desires, to deferred (or return) payments, and (since 1939) to payments for use less than minimum, due on that machine or other machines in that factory. The credit is not available if the lessee is in default on any payment due United, or if the lease has been terminated by reason of the lessee's breach or insolvency.

returned, before the end of the term, to be replaced by a non-United machine, as compared with the lower charges assessed if the machine were returned for another reason. It should be noted also that Judge Wyzanski ordered United to discontinue the right of deduction fund and not substitute anything similar in any plan or lease.

Non-Segregated Repair Service Charges. The lease provided that the lessee was to make all repairs at its expense. Instead, United made the repairs at no additional cost. United argues that while Judge Wyzanski found this practice tended to prevent the entry and existence of large-scale independent repair companies and hence put a stumbling block in the way of competing machinery manufacturers, it was a boon for the lessees. United states that Hanover realized it was getting repair service without additional expense, and insisted on efficient service at all times. Judge Wyzanski found United's practice of rendering repair service without separate charge "has brought about a situation" in which there are almost no large-scale independent repair companies. It was not a boon because Hanover paid for it. Judge Wyzanski found that United set monthly and unit charges high enough to pay for the services rendered. Judge Wyzanski pointed out this practice was an advantage to some shoe manufacturers, not because United performed the service when it was not obligated to do so, but because the manner of recovering costs therefor, through inclusion of a factor in machine rentals, worked to the advantage of those manufacturers that had high service requirements to the disadvantage of those that had low service requirements. The repair service clause plus United's conduct was a deterrent. Hanover paid for the service. To have non-United service meant double pay-

ment. Thus, independent service companies did not develop and Hanover was at the mercy of United.

Ten Year Term. United argues that by 1939 its machines had been under lease for more than 27 years, and those prior to 1929 were all on 5 year renewal terms; that the only exception after 1939 would be for new machines installed after that date. The anwer is there were a substantial number either on 10 year terms for new machines, or on terms in excess of 5 years for those whose original term had not expired.

Neither the individual clauses nor the lease-only system can be viewed separately. The evil is the result of their collective use. As Judge Wyzanski said, ". . . some of them alone are important impediments [but] . . . they must be appraised collectively to appreciate the full deterrent effect." Judge Wyzanski found that if shoe machinery were available upon a sale basis, some shoe manufacturers would have been able to provide service at less cost than that charged by United. They would not be subject to the unilateral decision of United whether or not to continue or modify the informal policies by which it administered its leases, thereby releasing shoe manufacturers from some of the psychological and economic power United exercised over them.

In Futuro Argument. United submits that the decree in the Government case was intended to operate prospectively only, citing "may" in listing the effects of the full capacity clause. Judge Wyzanski did not use "may" in describing the effects on the other clauses. He characterized the four clauses as features which "have" a special deterrent effect, and spoke of the deterrent effects of United's policies on the shoe machinery industry.[7] It is clear that he had in

[7]See footnote 3, supra.

mind the effects that the clauses and practices did have, and not merely the effects they might have. This is confirmed by the conclusion that United's practices operated as a method of excluding competitive shoe machinery from the shoe factories, based on findings of such practices in the 90 instances United invoked the full capacity, return, or like provisions of the standard lease during 1927-1948.

In its brief United states, "We are relying upon a unique record of *res judicata* and upon the fact that, as Judge Wyzanski acknowledged, the practices now attacked were in prior cases not only 'uncondemned' but also 'were in part endorsed'."[8] It maintains that its preponderant position, as measured by percentages of machines in shoe factories, is not enough to sustain Hanover's burden of proof of monopoly; that this position is due to its original constitution, which Judge Wyzanski regarded as protected by res judicata, and the superiority of its products; that Judge Wyzanski found the leasing system honestly industrial; and that even the full capacity clause had been approved in a prior case.

The prior Government cases do not bar the holding of monopolization. Judge Wyzanski was aware of them when he framed his findings, opinion and decree. He indicated that but for the prior cases he would have held United in violation of Section 1, as well as Section 2 of the Sherman Act. There is no support for the statement that United's preponderant position is due to its original constitution and product superiority. Judge Wyzanski pointed to these two factors and the leasing system and its aspects as the principal

[8]Three earlier antitrust cases involved United: United States v. Winslow, 1913, 227 U. S. 202; United States v. United Shoe Machinery Company of New Jersey, 1918, 247 U. S. 32; and United Shoe Machinery Corp. v. United States, 1922, 258 U. S. 451.

sources of United's power. In connection with product development, which is closely related to product superiority, Judge Wyzanski found that the rate at which United improved old machine types did not create a formidable record, and United's research in the shoe machinery and in allied developments was neither the basic cause of its success nor far beyond what could be achieved in a monopoly free market. The leasing system and its aspects were the barriers to competition, and were the basis for the decree of monopolization. It is immaterial that Judge Wyzanski said the original constitution was protected by res judicata, and that he did not criticize the other sources of United's power. And while he did say that the leasing system and practices were honestly industrial, he also said that they represent policies which are unnatural barriers to competition, unnecessarily excluding actual and potential competition and restricting a free market.

There is also the contention that Judge Wyzanski's judgment gave effect to what he recognized to be a change in the law beginning with United States v. Aluminum Co. of America, 2 Cir. 1945, 148 F. 2d 416; that while courts can overrule their own decisions and change the law retroactively, they also can limit a precedent reversing decision to prospective application; and that retroactive application of an overruling decision is inequitable and is not invoked when persons have acted in reliance on the prior decision. Assuming that the decision in the Aluminum Co. case represented a change in the law, effective in 1945, Judge Wyzanski did not attempt to limit his decree to the future. Therefore, there is no merit to this argument. See American Amusement Co. v. Ludwig, D. Minn. 1949, 82 F. Supp. 265, 267; United States v. Calamaro, E. D. Pa. 1956, 137 F. Supp. 816, 820, *rev'd on other grounds*, 3 Cir. 1956, 236

F. 2d 182, *aff'd* 1957, 354 U. S. 351. Some of the relief looks to the future, but this does not mean that the court did not find a monopolization, or did not intend its decree to be retroactive. The decree operated both ways. The court required United to cease certain practices and also to terminate outstanding leases.

In summary, the findings, conclusions and decree in the Government case established that United's preponderant position coupled with its lease-only system, the four clauses and its practices with respect thereto constituted a violation of Section 2 of the Sherman Act, and that such policies and practices were restrictive or monopolistic during the complaint period in this action, and had a restrictive effect on Hanover and other shoe manufacturers. With the aid of the decree Hanover has proved a monopolization.

2. The Estoppel Aspects and Relevance of the Government Decree.

The estoppel aspects and relevance of the Government decree have been termed by some courts the "target area." These courts have held that if the decree, fairly construed, does not embrace the plaintiff as a target of the antitrust violation, there can be no recovery. The injury and the damage must not be remote from the violation. A plaintiff "must show that his claimed injury stemmed directly and proximately from the same type of practice condemned in the Government action." International Shoe Machine Corp. v. United Shoe Machinery Corp., 1 Cir. 1963, 315 F. 2d 449, *cert. denied* 1963, 375 U. S. 820. The difficulty does not lie in the principle, but in its application. "It is not possible to formulate any general rule by which to determine what injuries are too remote to bring a plaintiff within the scope of the Act. . . . Each case must be dealt with on its

own facts." Harrison v. Paramount Pictures, Inc., E. D. Pa. 1953, 115 F. Supp. 312, *aff'd per curiam*, 3 Cir. 1954, 211 F. 2d 405.

Prior to the trial, there was a trial on a separate issue in accordance with Fed. R. Civ. P. 42(b), 28 U. S. C. A. The issue was to determine whether excessive shoe machinery costs constituted an injury in that all such costs were passed on by Hanover to its customers. The late Judge Goodrich of the Court of Appeals, sitting as a district judge, found for Hanover. Hanover Shoe, Inc. v. United Shoe Machinery Corp., M. D. Pa. 1960, 185 F. Supp. 826. The Court of Appeals affirmed. 281 F. 2d 481. The order for the separate trial assumed that (1) the violation of law as alleged existed, and (2) the excessive cost of shoe machinery as alleged existed. Judge Goodrich held that "The causal relation between defendant's wrong and plaintiff's harm is obvious."

In La Chapelle v. United Shoe Machinery Corp., D. Mass. 1950, 90 F. Supp. 721, the complaint charged that an inventor was forced to sell his product to United at less than its value because of United's monopoly. The court refused to dismiss the complaint.

> "The more frequent complaint against a monopoly is by one who seeks to buy and complains that since the monopolist controls the market he must therefore buy from the monopolistic seller at the latter's price, or not at all. But the injury is equally great to one who wishes to sell his product in a market subject to monopolistic control and must sell to the monopolist as the only available buyer, again on the monopolist's terms, or not at all. Here the injury is the direct resut of the monopolistic condi-

tion which has been created, and the injured seller may recover under § 15." (90 F. Supp. at p. 723)

After an answer was filed, the court granted defendant's motion for summary judgment because the plaintiff had previously filed a complaint against the defendant alleging the same cause of action, which had been dismissed with prejudice. The reason for the dismissal does not appear. No appeal was prosecuted. Consequently, La Chapelle is still authority for the proposition that the target area is not limited to a monopolist's competitors. See Congress Building Corp. v. Loew's, Inc., 7 Cir. 1957, 246 F. 2d 587; Vines v. General Outdoor Advertising Co., 2 Cir. 1948, 171 F. 2d 487.

In Chattanooga Foundry & Pipe Works v. City of Atlanta, 1906, 203 U. S. 390, plaintiff purchased pipe at an excessive price due to an illegal arrangement between defendant and others. The court held the plaintiff ". . . was injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe." United attempts to distinguish this case because the excessive price of the pipe represented property diminished by the payment of money wrongfully induced by a conspiracy; whereas, here there is no wrongful inducement because the rentals were paid in accordance with valid leases. In Chattanooga the sale was lawful, but the motives and inducements to make it constituted a wrong, that is, a combination of members of a trust who arranged for the sale at an excessive price after simulated competition which induced the buyer to buy. The court said:

". . . Finally, the fact that the sale was not so connected in its terms with the unlawful combination as to be unlawful, Connolly v. Union Sewer Pipe Co.,

> 184 U. S. 540, in no way contradicts the proposition that the motives and inducements to make it were so affected by the combination as to constitute a wrong. . . ."

United confuses the validity of the leases with the motives and inducements behind them. Hanover was induced to enter into the leases by the absence of suppliers brought about by the monopolistic practices, including the lease-only policy. The motives and inducements were so intertwined with the monopolization practices as to constitute a wrong. Both Atlanta and Hanover were buyers from an antitrust violator. The damages sought in both cases are the higher business costs caused by the wrongdoers. The cases cannot be distinguished.

The cases relied on by United are distinguishable. In Eagle Lion Studios, Inc. v. Loew's, Inc., 2 Cir. 1957, 248 F. 2d 438, *aff'd by an equally divided court,* 1958, 358 U. S. 100, the court interpreted the decree in the Government case as deciding that defendants monopolized only with respect to a segment of the market. They had restricted the films of the major distributors, but not those of the plaintiff and other independent producers. The practices of United were directed at the shoe machinery trade and commerce, and, therefore, at Hanover, a substantial and captive customer. In Conference of Studio Unions v. Loew's, Inc., 9 Cir. 1951, 193 F. 2d 51, *cert. denied,* 1952, 342 U. S. 919, the court held that the injury to plaintiffs, a union and its members, did not flow from the injury to the competitive situation of the motion picture industry caused by the restriction of activities of independent producers by defendants, a rival union and major film producers. The plaintiffs were not in the business of making or exhibiting motion pic-

tures, did not compete with defendants, did not buy from them, and were not even employees of the companies which the defendants intended to destroy. The remoteness of plaintiff's injury was apparent. In Karseal Corp. v. Richfield Oil Corp., 9 Cir. 1955, 221 F. 2d 358, Karseal and Richfield were manufacturers of wax. Richfield applied restraints to capture the independent gas station market. The court held Karseal was in the target area. The fact that Karseal marketed its product through middlemen, while Richfield dealt directly with retailers, was immaterial. The fact pattern for a direct injury was strong in Karseal. The court said: "Assuming Karseal was 'hit' by the effect of the Richfield antitrust violation, was Karseal, 'aimed at' with enough precision to entitle it to maintain a treble damage suit . . .?" Since Karseal was directly in Richfield's aim, the case sheds little light on the standard by which "enough precision" can be measured.

While Eagle Lion Studios, Conference of Studio Unions and Karseal are distinguishable on the facts, under the target area tests suggested by these cases Hanover's injury flows proximately from the monopolization. The complaint in the Government case listed the effects of the monopolistic practices on the shoe manufacturers, as well as on United's competitors. One of the effects on the lessees was United's extraction of large sums of money in excess of the reasonable value of machinery and of the service rendered by United. A similar charge is included in Hanover's complaint. Judge Wyzanski found that United's policies have ". . . not necessarily promoted in the *shoe manufacturing* field the goals of a competitive economy and an open society." He pointed out that if United shoe machinery were available on a sale basis, United's psychological and economic control over shoe manufacturers would be released,

which in turn would cause some shoe manufacturers, for financial and psychological reasons, to be more willing to dispose of United's machines and take on either competitors' machines or United machinery available in a secondhand market. It is obvious that the financial considerations were that some manufacturers would find it less costly to own than to lease machinery. Thus, a charge and finding of detriment to a particular class of persons, as seemingly required by Eagle Lion Studios, is present.

The facts satisfy the test of the Conference of Studio Unions case. Shoe machinery is not absorbed by the general public; it is meant for use solely by shoe manufacturers. They consume all of it, and its cost is a factor in the pricing of shoes. Shoe manufacturers are directly interested in the development of better machinery, and in the quality of existing machinery. It is clear that a shoe manufacturer is ". . . within that area of the economy which is endangered by a breakdown of competitive conditions . . ." in the shoe machinery industry.

The stifling of the business of competing shoe machinery manufacturers was a direct object of United's actions, but it was not the only object. It permitted United to deal with shoe manufacturers on United's terms, and the terms in turn permitted United to stifle the competition. The monopolistic terms, such as the lease-only system and the related clauses and practices, caused both the injury claimed by Hanover and the injury to United's competitors. There is nothing strange about an actor having more than one immediate object of his acts. The aim was wide enough to accomplish both. Hanover was "aimed" at and "hit," the test of Karseal.

United accuses Hanover of an attempt to bring itself within the target area

> ". . . by saying it was obliged to 'obtain its machinery from defendant at a cost in excess of what it would have to pay absent the monopolization' (Pl. br. 9). It tries to use its claim of excessive price to show injury as a result of antitrust violation. So far as the decree is concerned, it is enough here to point out that that claim was dismissed by Judge Wyzanski. Decree par. 2 dismisses with prejudice all other charges of violation than those there enumerated. Among those charges was the charge of excessiveness contained in par. 97 of the Government complaint as follows:".

This argument confuses Hanover's primary and alternate damage claims. Excessiveness relates principally to the alternate damage flowing from the difference between the rent and royalty charges United exacted from lessees when faced with competition and the higher charges exacted when it was not so faced. Hanover's primary claim is measured by the difference between the higher cost of leasing machines and the cost of owning them. The primary claim does not necessarily imply excessive returns to United.

The complaint in the Government case included an allegation that United collected excessive, arbitrary and noncompetitive charges for its products and services and thereby made excessive and unreasonable profits. Judge Wyzanski noted that while United generally followed a policy of setting prices so its shoe machinery business returned income to cover costs plus a profit, there were instances in which the rates were adjusted to meet or defeat competition, and to retain and expand United's share of the market. He found no evidence that United secured a monopoly profit on its entire or machinery branch opera-

tions. He did not make a finding that profits were excessive or unreasonable. While he found that the discriminatory pricing policy was evidence of United's monopoly power, a buttress to it and a cause of its perpetuation, he stated his decree would not deal with the price discrimination aspects of United's policy because some not too rigid price discrimination is inevitable, some is justified as resting on patent monopolies, some is desirable in promoting a competitive market, and an order to eradicate such discrimination could not be enforced.

The doctrine of collateral estoppel by judgment extends only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. Partmar Corp. v. Paramount Pictures Theatres Corp., 1954, 347 U. S. 89; Emich Motors Corp. v. General Motors Corp., 1951, 340 U. S. 558. The findings and conclusions on the price discrimination aspects of the pricing policy cannot be considered matters upon the determination of which the finding or verdict was rendered in view of the specific language that the decree would not attempt to deal with these matters. Thus, there cannot be an estoppel.

Hanover also relies for its alternate damage on certain documents in evidence in this case. One is a summary of 19 instances in which United reduced rents and royalties on certain machines because of competition. These 19 instances were taken from more than 50 instances in evidence before Judge Wyzanski, and from which he drew for detail analysis in arriving at his findings. Hanover asks this court to infer from the summary and from the evidence of overwhelming market control that, if competition existed, Hanover would have had the benefit of reductions similar to those listed on the summary. Admittedly, few, if any, of the machines on this summary were used by Hanover,

and most of the reductions took place prior to the complaint period in this case. The summary is irrelevant. The inference urged by Hanover cannot be drawn. International Shoe Machine Corp. v. United Shoe Machinery Corp., 315 F. 2d 449, supra. The decree created no estoppel with respect to the findings based on the evidence of 50 instances of reduced rentals, so that the only evidence before this court is the summary of the 19 instances.

Hanover also introduced in evidence a schedule of the percentage of revenues to machine or bulletin costs. The machine or bulletin cost is not the only item considered before a machine rental is set. The development expenses, installation costs, 10 year service costs, and interest on the last two items, are also considered. The rental would include all these, plus a profit, so that the percentage derived from the comparison does not demonstrate a "high rate of return." Moreover, while Hanover points to high percentages it considers "startling," the schedule contains percentages which are extremely low. The schedule also invites other comparisons such as the comparison of revenues with Hanover's computed sales price, also on the schedule, which would reduce the percentages considerably. There is no evidence of the normal rate of return if the omitted cost factors were included. In short, the schedule and related evidence are not sufficiently probative of the alleged high rates of return to United.

Hanover has failed to prove its alternate damage claim. This does not affect its primary claim measured by the difference between the cost to operate its business with lease-only machinery and the cost to own the machinery. The rental returns may not have been excessive, but there is a difference between non-excessive returns and machinery costs in excess of those which would have been incurred had the machinery been purchasable. As stated by Judge

Wyzanski, "Some truth lurks in the cynical remark that not high profits but a quiet life is the chief reward of a monopoly power." Machine rentals which return costs plus a reasonable profit to United may be substantially in excess of the machine costs to a shoe manufacturer dealing in an unrestricted market. A supplier's costs may be inflated due to inefficiency, excess personnel, or other reasons. Such conditions might not exist in a competitive market. There is no necessary inconsistency between a reasonable rate of return and proof that the rentals were substantially in excess of the cost of ownership. If the "quiet life" brought about by the monopolistic practice of United's lease-only system produced some excess costs to Hanover, it need not rely on excess returns to United to show damage. Hanover's claimed primary injury is injury flowing from United's lease-only policy and practices, provided Hanover was at all times ready, willing and able to buy machinery.

Judge Wyzanski did find there was virtually no expressed dissatisfaction from consumers respecting the leasing system; and that all shoe manufacturers who testified on the point expressed a preference for the leasing system. This was not a finding that shoe manufacturers were not hurt by the leasing system. Judge Wyzanski pointed out that "It cannot be said whether this absence of expressed dissatisfaction is due to lack of actual dissatisfaction, to practical men's preference for what they regard as a fair system, even if it should be monopolistic, or to fear, inertia, or reluctance to testify." He then pointed out the system's adverse effects on the goals of a competitive economy and on open society as related to the shoe manufacturing field.

3. Choice of Marketing Methods.

United urges that the language of Judge Wyzanski negates a duty to sell:

> "'The Court also agrees with the Government that if United chooses to continue to lease any machine type, it must offer that type of machine also for sale. The principal merit of this proposal does not lie in its primary impact, that is, in its effect in widening the choices open to owners of shoe factories. *For present purposes it may be assumed that the anti-trust laws are not designed, chiefly, if at all, to give a customer choice as to the selling methods by which his supplier offers that supplier's own products.* The merit of the Government's proposal is in its secondary impact [i.e. creation of a second-hand market]. (Emphasis supplied)'"[9] 110 F. Supp., at 349, 350

Judge Wyzanski found that the lease-only system and lease clauses enabled United to monopolize the shoe machinery market, and to end this monopoly it would be necessary not only to place limitations on United's leases, but also to require United to offer the machines for sale. Thus, United had a duty to refrain from illegal trade practices. See Congress Building Corp. v. Loew's, Inc., 246 F. 2d 587, 594, 596, 597, supra. If one of the practices by which it monopolized the market was its lease-only policy, it had a duty to abandon that policy. The only effective way was by an alternative sales system. The antitrust laws were designed to prevent monopolistic practices. They are not to be thwarted because an incidental effect of the decree may give a customer a choice of the supplier's marketing methods. While ordinarily a supplier may determine his own business practices, they will be condemned as illegal if they

[9]Quotation as it appears in United's brief at page 24. The original opinion did not contain the material in brackets or the emphasis.

are used to achieve a monopoly. "A refusal to sell, while it may be lawful per se, cannot be used in order to achieve an illegal result." United States v. Klearflax Linen Looms, Inc., D. Minn. 1945, 63 F. Supp. 32, 39. It is only another step to say a refusal to sell coupled with a willingness to lease may be lawful, but Judge Wyzanski found these achieved an illegal result:

> "It has used its leases to monopolize the shoe machinery market. And if leasing continues without an alternative sales system United will still be able to monopolize that market. To root out monopolization and to bring United, in the future, in the same class as its competitors, it is necessary not merely to place limitations upon United's leases, but also to require United to offer for sale any machine type which it leases." 110 F. Supp., at 350.

4. The Legality of the Leases.

United relies on the legality of the leases as a complete defense. It cites Bruce's Juices, Inc. v. American Can Co., 1947, 330 U. S. 743, 755; Kelly v. Kosuga, 1959, 358 U. S. 516, 518, 520; Turner Glass Corp. v. Hartford-Empire Co., 7 Cir. 1949, 173 F. 2d 49, 52, for the proposition that since the Form A leases are enforceable as contracts the courts will not sanction a belated antitrust action to avoid legal obligations now completely performed.

Whether the leases are legal is not important in this lawsuit because Hanover is not suing on them. United apparently contends that it would be unjust for Hanover to recover monies which would in effect offset rentals and royalties paid under a valid contract. It would also be unjust to allow a monopolist to escape liability for injury and damage inflicted on another even though the contractual

dealings between them were legal. United's products and services may have been efficient, the prices not excessive, and the leases lawful, but it runs the risk that its monopolistic acts may cause actionable injury. In Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U. S. 390, at page 397, supra, the court said:

> ". . . In most cases where the result complained of as springing from a tort is a contract, the contract is lawful, and the tort goes only to the motives which led to its being made, as when it is induced by duress or fraud."

The cases cited by United do not support its theory. In Turner Glass Corp. v. Hartford-Empire Co., supra, plaintiff offered no evidence to prove a pecuniary damage by reason of defendant's membership in a conspiracy to monopolize, but contended that the payment of license fees to defendant was evidence of pecuniary damage. Plaintiff admitted that if the license agreements were not inherently illegal, it could not prevail. The court held for defendant because they were not inherently illegal.

Similarly, in Bruce's Juices, Inc. v. American Can Co., supra, in an action for the purchase price of goods, the court refused to allow the defense of illegality of prices, but told the defendant it could prove the illegality in the triple damage action, which was pending.

> ". . . Moreover, if Bruce can in this suit prove that the prices respondent charged were illegal, as it must in order to win, it can do the same in a triple damage suit. . . ." Page 752.

The court simply refused to add another sanction to the antitrust laws.

> "The Act prescribes sanctions, and it does not make uncollectibility of the purchase price one of them. Violation of the Act is made criminal and upon conviction a violator may be fined or imprisoned. 49 Stat. 1528, 15 U. S. C. § 13a. Any person who is injured in his business or property by reason of anything forbidden therein may sue and recover three-fold the damages by him sustained and the costs of suit, including a reasonable attorney's fee. 38 Stat. 731, 15 U. S. C. § 15. This triple damage provision to redress private injury and the criminal proceedings to vindicate the public interest are the only sanctions provided by Congress.
>
> "It is contended that we should act judicially to add a sanction not provided by Congress by declaring the purchase price of goods uncollectible where the vendor has violated the Act. . . ." Page 750.

Then, after suggesting that the argument for the additional sanction might be a persuasive one for Congress, the court said:

> ". . . It is clear Congress intended to use private self-interest as a means of enforcement and to arm injured persons with private means to retribution when it gave to any injured party a private cause of action in which his damages are to be made good threefold, with costs of suit and reasonable attorney's fee." Page 751.

In Kelly v. Kosuga, supra, it is clear that the court decided that the avoidance of private contracts is not to be added to the sanctions provided by the Sherman Act. Implicit in these cases is that the sanctions of the Sherman Act remain

undisturbed. A legal and enforceable contract does not insulate a monopolist from liability to contracting parties.

D. The Injury.

1. Demonstration of Injury.

Hanover relies on Judge Goodrich's opinion in the separate trial of the "passing on" issue to prove injury. United answers that this is erroneous because Judge Goodrich went beyond the two assumptions on which the issue was tried, and made the causal connection himself in order to decide the issue.[10]

Judge Goodrich clearly ruled that on the basis of the assumptions Hanover suffered actual injury. He did not supply assumptions. His ruling shows that if the stipulated assumptions are proved, the other elements, the injury and the causal connection, are present as a matter of law. United misconstrues Judge Goodrich's statement ". . . If there are affirmative defenses or other complicating legal issues, they are not before the Court at this time." The fact of injury is not an affirmative defense, but an essential element of the cause of action, and the "other" issues refer to issues of which he was not aware. He was aware of the need to establish injury.

The hypothesis in the proceeding before Judge Goodrich was broad enough to cover Hanover's primary claim of damages. Judge Goodrich analogized this tort to negligence: ". . . there is (1) a legal duty on defendant's part (to obey the antitrust laws), (2) a violation of that duty, . . ." Similarly, there is a right in Hanover to conduct its

[10]The two assumptions were (1) that the violation of the law as alleged existed, and (2) that the excessive cost of shoe machinery as alleged existed.

business in a market free from the restraints of a monopolist. United's monopolistic practices violated that right. United's violation of that right caused an injury. If Hanover proves the amount of damage, as Judge Goodrich stated, the causal relation between United's wrong and Hanover's harm is obvious. This court fully agrees with Judge Goodrich, and finds that Hanover sustained redressable injury by United's acts. Thus, while United's characterization of the trial of the "passing on" issue as a "mere motion to dismiss" makes no difference with respect to whether this court can and should follow such decision as the law of the case, 1A Moore, Federal Practice, Para. 0.404(4) at page 4213, Para. 0.404(10) (2d ed.); United States v. Wheeler, 3 Cir. 1958, 256 F/2d 745, 747, in view of this court's finding, United's argument with respect to the law of the case need not be fully discussed.

2. The Impact of Monopolization on Hanover.

As a final and complete defense to the antitrust violation United contends Hanover has not shown actual impact of monopolization on it. Some of the reasons advanced are: There was no written purchase policy or expression by the Board of Directors; Hanover bought machines only when it was advantageous to do so; Hanover leased 136 optional machines; Hanover never protested its inability to purchase lease-only machines; the 1955-1956 purchases disprove a purchase policy because important machines were retained on lease, some were replaced by non-United machines, 39 were returned, and in buying Hanover used its credits in the Right of Deduction Fund as part of the purchase price; both foreign and non-United domestic machines were available; Hanover's attitude toward United's leasing policy is the result of a quarrel

between its president and certain United officials; Hanover and its competitors enjoyed equality of treatment since the lease terms were uniform, and, thus, there could not be an injury; and Judge Wyzanski found virtually no shoe manufacturer was dissatisfied with the leasing system.

There was testimony that since the 1920's Hanover was actively engaged in a search to buy non-United Goodyear welt shoe machinery. Mr. Sheppard, president of Hanover, described clicking machines which were purchased to replace United's machines. He told of visits in the 1920's and 1930's to various other welt shoe factories in a search for machines. In the early 1940's Hanover purchased some sole leather dieing out machines to replace their United counterpart. The search for machines was dormant shortly before and during World War II. Whenever shoe makers gathered, there was talk about the purchase of foreign machines after the war ended. Hanover and other shoe factories tested many foreign machines when they became available in 1948 and 1949. The various shoe manufacturers exchanged the test information. The tests and other evidence showed that between 1939 and 1955 only a few non-United machine types, comparable to United lease-only machines, could be used satisfactorily in the Goodyear welt process. Only three such machine types were found and in each case Hanover purchased them.

In 1949 the National Shoe Manufacturers Association (N. S. M. A.), of which Mr. Sheppard was president from 1946 through 1949, and representing 85 to 95 percent of the shoe manufacturing industry, formed a committee, with Mr. Sheppard as a member, to study numerous problems concerning shoe machinery costs, to search for and disseminate information on modern non-United shoe ma-

chinery, to assist members in the evaluation of machinery, and to persuade United to offer more of its machinery for sale.

The absence of a written declaration of a policy to buy machinery, the lack of such an expression in its minutes, and the testimony of Mr. Sheppard that Hanover's policy was to buy machinery only ". . . as far as we could do it advantageously and worth while" are not significant. Hanover was a closely held family corporation. The most important machines were not for sale. Mr. Ray Purtell, employed by Hanover as an assistant superintendent from 1949 to 1956, testified that during his employment the policy of Hanover was to purchase machines, both United and non-United. The policy to purchase only when it was advantageous is merely sound business practice. Hanover need not show that in any and all cases it would have purchased, but that it likely would have purchased the machines. Hanover's purchase of substantially all of United machinery in place at Hanover in 1955-1956 is some indication Hanover would have considered it advantageous to purchase during the lease-only period.

Hanover never asked United if it could buy the lease-only machines. Neither did it protest its inability to buy. Mr. Sheppard testified that any such request would have been a "foolish question." This explanation does not seem unreasonable in view of the findings in the Government case and the evidence in this case. Not only Mr. Sheppard, but representatives of the whole shoe machinery industry apparently thought that they were captive customers of United. In a proposed statement by the technical committee of the N. S. M. A. to United protesting increases in unit charge rates in 1950, the committee requested that it be con-

sulted about rate increases particularly ". . . since the only choice a shoe manufacturer has is to pay the increases or stop making shoes."

Mr. Sheppard was interviewed by representatives of United prior to the Government case. The purpose of the interview was not to obtain Hanover's complaints against United, but to obtain Mr. Sheppard as a witness for United in the Government case. He was asked whether he had any objections to the leasing system, but he was not asked whether he would prefer to buy rather than lease. The leasing system had many facets of which lease-only was one. In view of the shoe machinery market, a reasonable interpretation of the question is whether there was any objection to the leasing system as it existed. In the interview he mentioned an incident when he refused to lease clicking machines because United insisted that Hanover acknowledge in the lease that United owned the machine dies which Hanover had purchased. Before the matter could be resolved. Hanover purchased 11 Reece clicking machines. Mr. Sheppard described the rejection of the United machines as brazen and "perhaps stupid," because the Reece machines were unsatisfactory and later abandoned with a return to United machines. This one instance does not support an inference that Hanover would have purchased machines only when the lease terms were unacceptable.

Optional Machines. During the complaint period Hanover leased 136 optional machines. The optional machines were the minor, simpler, less complex machines. Some were not purchased because the price was too high. During the same period Hanover purchased non-United machinery, exclusive of dry thread sewing machines, for prices totalling about $335,000. This was almost four times the rentals of

both United and non-United machinery it could have purchased during the same period. In addition, Hanover purchased United optional machinery totalling about $29,600. The rentals for non-United machinery totalled about $101,100, of which about $76,900 was for lease-only. Total rents and royalties paid United were about $2,417,700, but only about $64,700 or 2.68 percent was for optional machines.

The effect of optional machine rentals, which were flat rate, could be minimized through efficiency and quantity production, and this would offer less incentive for ownership than in the case of lease-only machines. The latter, with few exceptions, were offered only on a royalty or rental and royalty basis. The leasing of some optional machinery because the purchase price was too high, the substantial purchases of machinery from non-United sources, the low percentage of optional rentals to rental and royalty expense, and cost savings which could be achieved through efficient use of optional machines point to a Hanover purchasing policy, rather than to a leasing policy.

The 1955-56 Purchases. Pursuant to order of the district court in the Government case, a plan for the termination of all outstanding Form A leases became effective on June 1, 1955. All lessees were given the option to terminate their leases, and to purchase the machines at prices computed in a discount schedule set out in the plan. In October, 1955, Hanover purchased 205 of the 306 machines it then held on Form A leases, deferring action on the remaining machines for various reasons. By December, 1956, Hanover had purchased an additional 7 machine types, consisting of 58 machines, and it returned 37 machines to United. The total cost of the machines purchased by Hanover in 1955 and 1956 was about $613,900. In 1960 two additional machines were purchased, three were returned and one remained on lease. Also, in 1955 when United offered

its lessees the option to service their own machinery, with a credit of 13.3 percent against lease charges, Hanover chose to do so.. These purchases show a disposition by Hanover to buy if it could do so advantageously. It is true that the prices were at discounts and the result of negotiations, and that Hanover postponed for one year a decision to buy about $100,000 worth of machinery. United says the prices were bargains; at the time the N.S.M.A. said they were too high. The 1955 prices were the product of extended discussions in which factors such as age, obsolescence, etc., were applied. Even if the prices were bargains, it does not follow that Hanover would not have bought at higher prices. There is no evidence that Hanover refused to buy unless prices were a bargain. Also, the evidence is that Hanover retained the $100,000 worth of machines on lease, not because it preferred leasing, but because certain newly developed United and non-United machines were about to be marketed which might make those machines obsolete. Most of these were subsequently purchased. Hanover weighed many factors, such as price, the years required for a return of the investment, etc., before it decided to purchase. This was sound business judgment. Undoubtedly, these same factors would have been considered in 1939 and subsequent years. This does not justify an inference Hanover would not have bought during the complaint period. It authorized the purchase of machines of $500,000 from United and $250,000 from non-United sources. The few instances pressed by United to support a contrary inference are not convincing.

In its brief United states that Hanover did not buy important machine types such as heel seat lasters, toe lasters, and Goodyear stitchers, but retained them on lease. This was the testimony of Mr. Ray Purtell who had not been

employed by Hanover since 1956, and who testified "to the best of my memory." The credible evidence shows, however, that Hanover purchased four heel seat lasters and 14 toe lasters in the first group of purchases in 1955, and that none remained on lease. Also, 17 Goodyear stitchers were included in the first group of purchases, and of the two retained on lease, one was only a spare or standby machine and the other was eventually replaced by a foreign machine.

United also states that after completion of the 1955-1956 purchases, Hanover continued three machines on Form A leases until their return in 1960. The testimony in support of this statement is somewhat ambiguous, and the record otherwise shows the machines were retained on the Form B lease.[11] One was a machine type of which Hanover purchased nine, indicating that this may have been an excess machine. Another was a machine type of which Hanover purchased two, and the evidence is that the returned machine was a new machine originally listed for purchase. The third was the spare or standby Goodyear stitcher. Hanover also converted to Form B leases certain machinery considered for purchase in 1955. Except for the Goodyear stitcher, these machines were later either returned or purchased.

Hanover replaced certain United machines with non-United machines. These instances were few, but together with Hanover's contemplated expenditure of $250,000 on non-United machines and its action in waiting for the development of non-United machinery indicates that Hanover did not prefer to lease United machinery. Hanover's

[11]The Form B leases were the new leases approved as part of the plan to terminate Form A leases. The objectionable features of the Form A lease were eliminated.

disposition to buy. United machinery may be inferred from both non-United and United machinery purchases in 1955-1956, particularly if acceptable non-United machinery was not available prior to that time.

The return of 39 machines at the time of and following the 1955-1956 purchase demonstrates only the unlikelihood of the purchase of those machines, but not the other machines. They were only a small part of the machines evaluated for purchase. Some were optional which never entered into the damage calculation. Hanover eliminated rental costs from the remainder so that only relevant royalty costs remain in the damage calculation.

Availability of Domestic Non-United Machines. There is little evidence that major comparable non-United machines for use in the Goodyear welt process were available from United States manufacturers. Mr. Swinney, a retired employee of and consultant to Genesco, a shoe manufacturer, testified that in 1949 he had seen a Hamlin heel and toe bed laster in the Hamlin Shoe Co. in Massachusetts, and in 1920 he had seen a R. H. Long lockstitch machine in the Rice and Hutchins factory in Massachusetts. While these machines performed the same function as their United counterparts, he did not testify that their performance and capacity compared with United machines. He identified some 15-20 other domestic machines, whose functions were similar to certain United machines. He only mentioned two that were of comparable quality. One, the Prime Manufacturing Rib Reinforcing Machine, was purchased by him in 1949 when he bought three for a total of $125.00. It is not likely this was comparable because the 1955 price of one such United machine was $4,825.00. The other, a Peerless Machine

Works Eyeletting Machine, was purchased by him in 1949; but there is no indication as to how long the machine had been available for purchase. Neither machine was one of the eight key machine types used in the Goodyear welt process: Pulling Over, Staple Side Lasting, Toe Lasting, Heel Seat Lasting, Inseaming or Welting, Inseam Trimming, Rough Rounding, and Lockstitching. Moreover, although Mr. Swinney had been associated with the shoe business for many years, most of his observations were limited to the years 1949-1950.

While Hanover purchased three LeMatic Sole Press machines and ten Schwabe Clickers in 1951 and subsequent years, there is no evidence of how long these had been available prior to 1951. The only machine which appears to have been available prior to and since is the Landis stitcher which, while primarily intended for use by the shoe repairing industry, was also used satisfactorily in welt shoe manufacture.

Availability of Foreign Machine. The principal testimony was given by Mr. Swinney and Mr. Major, also an employee of Genesco, Mr. Walker, an official of United, and Mr. Becka, general manager of the International Shoe Machinery Company. In 1950 both Mr. Swinney and Mr. Major were connected with the establishment in Israel of a shoe factory in which Genesco had an interest. The following is a summary of their testimony, together with comment.

Mr. Swinney. The Goodyear welt machines used in the Israeli factory had been obtained in England from Standard Engineering Company, a British manufacturer. They performed the same function as United machines. Most of his observations were limited to machinery he saw in operation in 1949 in connection with the procurement of ma-

chinery for the Israeli factory. He identified about 70 foreign machines of various types and manufacture which he had seen in operation. He did not testify that any of these machines were in operation in the United States between 1939-1955. There were seven machines of different types which he considered comparable to United machines. Six of these were Standard. There was no evidence that they were available before 1949-1950. Only two were in the key category. One was a Standard Oscillating Welt Wheeling Machine No. 93, "Very similar in quality and quantity of production" when compared with the United machine, called Goodyear Welt Indenting and Burnishing. The capacity of the Standard machine was 700-800 pairs of shoes per day, and two different United machines of that type had a capacity of 1800 pairs per day. The other was the Standard Heel Seat Lasting machine, on which he expressed no opinion on comparableness. According to the catalog, capacity of the comparable United machine exceeded the Standard by 300 to 400 pairs per day.

Although for a long time Genesco had much information on foreign machines, and had tried them, it used only United machines in its Goodyear welt factories in the United States. It procured none of the Goodyear welt machine types used in Israel for its United States factories. He remembered seeing only one foreign machine in any domestic Genesco factory, an Albeko Band Knife Splitter, which was a machine type also purchased in 1953 by Hanover.

Mr. Major. Mr. Major's testimony was similar to that of Mr. Swinney.

Mr. Walker. While he was manager of United's Milwaukee territory in the 1930's he saw five foreign machines

of the key type installed in domestic shoe factories: a Moenus Staple Side Laster, Heel Seal Laster Pulling Over, Welter and Stitcher and a Standard Welter. These machines "did a passable job; I don't think any machines are necessarily comparable to the performance of United machines." Most of the machines were not even rated as passable on United's Outside Machine Reports (O. M. Rs.), prepared by him or under his direction, and on other United documents prepared at the time he saw the machines. The Moenus welter was not used at all during a particular week because a German mechanic was working on it, and the operator was having considerable trouble with it. Later the machine was removed as unsatisfactory, and replaced by a United machine. Subsequent reports indicated that the seller was having trouble placing the machine in another factory for trial. The Standard Welter, installed in the same factory, was removed in 1937 as a "total failure." The only machine type other than key machine types was a Montreal or a Moenus sole layer which he also rated as passable.

Some foreign machines were described on O. M. Rs. as "man killer," "unsatisfactory," and "total failure." He attempted to explain these ratings by stating that he thought that the factories were not interested in making the machines run, and it was not his job to encourage or make it possible to make the machines a success. He thought the machines could have performed satisfactorily.

The explanation is not convincing. It is unlikely that a concern would obtain a machine on a trial basis, and have its organization disrupted in an attempt to operate it, if it was not interested in seeing it run. Whether Mr. Walker was not interested in seeing it run, or in not encouraging its

success, is immaterial. He was an outsider in no way connected with the potential seller or buyer. No one would expect him to breach his loyalty to his employer by encouraging or aiding in the success of a competitor's machines. One would expect him to be factual in his reports to his employer. If a machine was not unsatisfactory, an unqualified rating to that effect would be of little value to United.

Mr. Becka. For a long time he had been familiar with foreign shoe machinery and with United machinery, since ". . . United machines were practically the only machines . . .". In 1954 he made a trip to Europe to examine shoe machinery. Five machine types—heel seat lasters, stitchers, rough rounders, stapleside lasters and pulling over machines—were ". . . equally as good and suitable for use in Canadian or American shoe factories." Foreign machines brought here must be modified for such things as the particular way they are to perform, electrical requirements, custom installation, and the like. A shoe manufacturer could not very well modify the machines unless it also went into the shoe machinery business. Two American shoe manufacturers had equipped their factories with machinery other than United, but both had machine shops equipped for the manufacture of machinery. In the distribution of foreign machines, the spare parts, service, and technical know-how are of major importance, and a shoe manufacturer could not acquire foreign machines without an assurance of a local supply of parts and availability of local service. There were only four organizations which offered this service. He knew of only a few Goodyear welt foreign machines in place in United States shoe factories prior to 1955.

Mr. Becka's observations were limited to about one year prior to the complaint period, and are at variance to

data and reports accumulated by United. And there is no evidence that Hanover had facilities for the manufacture of shoe machinery. It is not necessary to detail Mr. Becka's testimony of the four shoe organizations. It is sufficient to say that none would have been adequate if Hanover had purchased foreign machinery.

There is other evidence of the non-availability of acceptable foreign machinery. Mr. Sheppard testified that Hanover would not purchase machines that would not do the work of United machinery because of Hanover's policy of high quality performance and production. He testified that whenever foreign machines suitable to Hanover's needs were found, they were purchased and substituted for United machines. Also, in the Government case United requested the court to find as a fact that as of 1952

> ". . . The evidence is clear that shoe manufacturing practices in Great Britain and continental European countries vary markedly from those of the industry of this country; that the productivity of such foreign factories is universally below that of American factories; that the high production of the American industry is not a requirement of these foreign industries; and that machine and operating characteristics acceptable abroad are not acceptable to the industry of the United States. The main reason for the production superiority of the shoe industry of this country lies in the machinery developed and introduced by United. . . ."

In a communication, dated July 7, 1952, United recognized that ". . . The war brought about a cessation of activities, not only of those [European shoe machinery]

companies, but of our own foreign companies to a considerable extent, and in some instances the plants of foreign shoe machinery manufacturers were damaged." The communication also noted that of late, foreign manufacturers had recovered from the effects of the war and were making efforts to introduce their machinery into the United States, indicating United's awareness of the absence of foreign machines during the period from the war to 1952. Such foreign machines were described as copies of United's older existing models, and while many were listed as good machines, the communication stated that this rating was ". . . . based on performanee under European conditions where the requirements are normally much different from those existing in this country, . . .", and that United machinery ". . . can deliver superior performance under the conditions and requirements of this country. . . ." The list included key and other machine types used in the Goodyear welt process. Most of the key machines were by Moenus, Adrian & Busch, Standard and Sagem.

A statement by Mr. Purtell that the purchase policy was set up only after the availability of United's lease-only machinery is urged by United wholly out of context. The record shows that this statement was confined to the lease-only machines purchased in 1955-1956. Previously, he had been asked whether from the beginning of his employment in 1949 he was aware that Hanover had a policy to buy shoe machinery. He answered, ". . . I believe we purchased machines that were—whether it be United's or anyone else's, that were available, on a purchase basis, . . ." but that during those years most major United machinery was necessarily on lease. Also, United's O.M.Rs. in 1951 state that Hanover preferred to purchase as many machines as possible, thereby eliminating unit charges.

On the evidence in this case the conclusion is inescapable that there was very little suitable foreign machinery available and then only toward the end of the complaint period.

But even if foreign machines were comparable in all respects to United machines, it does not mean that shoe manufacturers were free to procure them. High production in short runs is a characteristic of the shoe industry in the United States, and this makes work stoppage due to parts and service difficulties a major problem. Hanover regarded adequate service and a ready supply of parts a most important factor in the purchase of shoe machinery, particularly the more complicated types. In 1952 United recognized the effort "of late" of European shoe machinery manufacturers to introduce their machinery into this country, their plants having recovered from the effects of World War II. The vice president and general manager told the branches, ". . . We are also sure you have in mind the high standard of our service, and we mean that in the broadest sense, the rapidity with which we can adapt styles and conditions, and the availability of our stock of replacement parts. Experience both in this country and abroad indicates you cannot emphasize too strongly the fundamental importance of this parts stock."[12] United recognized the import-

[12]Later in 1952, United's Research Department, after reporting on foreign machines of different types and manufacture, concluded that:

. . .

"Assuming the fact that most foreign shoe machines will eventually live up to our high standards of quality and production, the quantity of major machines of foreign make installed in the U. S. will depend on the efficacy of a suitable maintenance service and parts stock.

"Further assuming that the distribution of these machines and their maintenance service would be handled by companies with branches in the nation's shoe centers such as I. S. M. C. and Compo Shoe Machinery Corp., the parts supply would, to say the least, present a serious problem to their agents. It would be most costly to import spare parts and stock them in sufficient numbers at strategic points, a fact which would reflect in the shoe manufacturers' overhead.

ance of adequate parts for foreign machines installed in domestic factories in the 1950's. Their O. M. Rs. for that period state that a Moenus heel seat laster, and a Standard outsole lockstitcher were unsatisfactory for the reason, among others, that parts service was poor.

Thus, with very few exceptions, it is clear that no domestic non-United or foreign machines, comparable to United machines in capacity and performance, and for which there was service, parts and technical advice, were available to Hanover.

Hanover had sufficient finances to purchase. It had ample working capital. During 1939 and 1940 its current and total liabilities were minimal in relation to current assets, and even to quick assets. United's expert, Dr. Corson, a management consultant on problems of economics, marketing, finance, personnel administration and organization, testified that Hanover had sufficient funds to purchase the machinery here in question without borrowing additional capital. If it had borrowed in 1939, its financial condition

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"Should the United States agents of foreign shoe machinery manufacturers decide to produce spare parts for foreign machines in this country, the cost of fixtures, jigs, etc. for so many various models of different make would make the capital outlay seem prohibitive in view of the limited market.

". . . The shoe manufacturer who has acquired foreign machines at a comparatively low purchase price would also be forced to invest in a costly spare parts stock and to employ a trained staff of mechanics for the maintenance of these machines in an adequately equipped workshop. This, in our opinion, would tend to offset, if not wipe out, the initial saving derived from the purchase of a lower-priced machine and would increase the manufacturing cost of footwear. The above would be true with all major machines such as pulling over, side lasting, outsole stitching, and inseam sewing machines.

. . .

"We, therefore, assume that, while a few major foreign machines may find their way into domestic factories, there is at this time not too great a danger of any mass import. . . ."

was such that the interest would have been at the then prime rate of 1½ percent, or at most 2 percent.

Finally, United argues that the rental and royalty payments, even if higher than the costs of purchase, could not have injured Hanover because the lease terms were uniform among all shoe manufacturers, citing Keogh v. Chicago & Northwestern Ry. Co., 1922, 260 U. S. 156, 165:

> ". . . Here the instrument by which the damage is alleged to have been inflicted is the legal rate, which, while in effect, had to be collected from all shippers. Exaction of this higher legal rate may not have injured Keogh at all; for a lower rate might not have benefited him. Every competitor was entitled to put —and we must presume would have been put—on a parity with him. And for every article competing with excelsior and tow, like adjustment of the rate must have been made. Under these circumstances no court or jury could say that, if the rate had been lower, Keogh would have enjoyed the difference between the rates or that any other advantage would have accrued to him. The benefit might have gone to his customers, or conceivably, to the ultimate consumer."

The Keogh case differs significantly. The action was brought under Section 7 of the Sherman Act against several railroads who were charged with combining to fix unreasonable rates. United was not a public utility and was not regulated. Its rates were not fixed. United was not required to charge uniform rates, and Hanover was not required to accept and pay the same machinery costs as its competitors. If Hanover could have reduced machinery costs by purchase, it should have been free to do so. Com-

petitors might not have had the financial ability, or the borrowing capacity, or the foresight to purchase. It might have been advantageous for some of them to lease and not to purchase. The other manufacturers were not entitled to be put on a parity with Hanover. Consequently, an option to purchase, as distinguished from a uniform rate, might have benefited Hanover. Some manufacturers might not have had a cause of action. Hanover and its claim are unaffected by those who had a cause of action, and did not pursue it, or failed in the attempt.

Hanover has proved that as a consequence of United's monopolization it was unable to purchase most of the more important machines which it would have purchased had they been available.

E. Damages.

1. The Leidesdorf Calculations.

The primary damage claimed by Hanover is the excess of leasing costs over what it would have cost to own the same machines had they been available for purchase during the period from July 1, 1939, to September 21, 1955. This required, among other things, a determination of what the purchase prices would have been. The first time the lease-only machines were offered for sale was in 1955 when United established prices for the sale of its machines new (1955 prices). Hanover's proof consisted of the following steps.

a. The cost to Hanover of the machines presumably purchased by it in 1939, or in any subsequent year when additional machines or replacement machines were presumably acquired by it, was determined by applying the *Bureau of Labor Statistics Consumer Price Index, All Items,* for the years of acquisition, to the 1955 prices.

b. The cost so determined was reduced by the residual value of (1) machines deemed to have been disposed of at the end of an assumed life expectancy and (2) machines on hand on September 21, 1955, the date of the commencement of this action. The reduction was determined by first applying to the 1955 prices the discount table that had been negotiated between United and N. S. M. A. pursuant to the order of the district court (the discount table). Then the *Bureau of Labor Statistics Consumer Price Index, All Items,* for the years of disposition prior to 1955 was applied to the discounted prices.

c. The difference between a. and b. was subtracted from the total rents and royalties paid by Hanover during the complaint period.

d. The estimated cost to Hanover of servicing the machines it presumably purchased was deducted from the remainder. For the 20 major machine types this service cost was based upon the actual service costs Hanover incurred when servicing the 20 major machine types during the year September 1, 1961, to August 31, 1962. No allowance was made for the lower costs that would have been incurred during the complaint period. For the remaining 37 machine types, the service cost was determined by taking that proportion of the service costs for the 20 major machine types for the year ending August 31, 1962, which the rents and royalties paid on such 37 machine types bore to the rents and royalties paid on the 20 major machine types.

Three separate calculations were prepared by S. D. Leidesdorf & Co. (Leidesdorf), Certified Public Accountants, all of which are based substantially on this method, differing mainly in the life expectancy assumed for the various machine types. One was based on a study of the

life expectancies made by Professor Joel Dean, an expert employed by United, and used by it in the course of the negotiations with the N. S. M. A. A second was based on a fifteen year life expectancy, accepted by the Internal Revenue Service for shoe machinery, for all machine types. The third was based on a life expectancy determined from the actual shipments of machines by United to Hanover, and the actual returns of machines by Hanover to United. The damages shown by the three calculations vary between $1,821,431.77 and $1,836,060.90.

United raises several objections to this proof, which it contends renders it "speculation or guesswork" and not within the guidelines established in Keogh v. Chicago & Northwestern Ry. Co., 260 U. S. 156, supra, and Bigelow v. RKO Radio Pictures, Inc., 1946, 327 U. S. 251.

The first objection is that the Leidesdorf calculations are merely mathematical calculations based on assumptions which have not been proven.

The Discount Table. United says it accepted the discount table under the pressure of the decree and the supplemental opinion of March 8, 1955, in the Government case, and after strenuous bargaining with N. S. M. A., and that Hanover used it, without further proof, in fixing the salvage value at given dates of the machines assumed to have been purchased at prior dates.

Hanover was faced with the necessity of establishing a value for machines on hand at the date of commencement of the action, or which had been disposed of previously, to be deducted from the computed costs of machines assumed to have been purchased to arrive at a computed net cost of ownership. Since there was no market price for secondhand machinery, Hanover used the discount table

which reflected age and other conditions. It had no alternative.

United offered testimony that the prices established by application of the discount table did not take into account actual value. This cannot be accepted. Value has different meanings to different persons. The discount table was negotiated. Negotiation is a process of submission and consideration of offers until an acceptable offer is made and accepted. United States v. John McShain, Inc., D. C. Cir. 1958, 258 F. 2d 422, 424, *cert. denied* 1958, 358 U. S. 832. United's contention, in effect, that it was forced to agree to such prices, is without merit. The decree required United, within certain time limits, only to present a plan for the termination of outstanding leases and for the sale of the lease-only machines. There was no attempt to dictate prices, or to force United to accept unreasonable lease and sale terms. Judge Wyzanski's supplemental opinion merely required United to disclose the data on which Joel Dean's calculations were based. Its purpose was to remove unnecessary roadblocks in the negotiations. It did not force terms on United or require it to accept the terms of N. S. M. A. United offered no evidence that the sales prices were in fact unreasonably low. The use of the discount table was proper.

Date of Commencement of Action. The salvage value of machines assumed to have been purchased is supposedly increased because the discount table assumes September 21, 1955, as the correct date for cutting off the estimated life of the machines, thereby diminishing the net cost of ownership. United has not suggested any other date.

The applicable statute of limitations is measured from the date the action was begun, September 21, 1955. Since this is the end of the damage period, the comparison of ren-

tal costs to cost of ownership would have to include machinery values established no later than September, 1955, for those machines assumed to be on hand at that date.

The 1955 Prices. United next argues that the sales prices constructed by Hanover assume, without any proof, that if prices were established by United for machines in 1939 and subsequent years, it would have established the prices so constructed, even though the 1955 prices were fixed under 1955 economic conditions, and under the mandate of the decree providing that sales prices could not be fixed so as to make it substantially more advantageous to lease, and that this is sheer speculation because those economic and legal conditions did not exist in 1939 and later years.

The issue is whether the prices computed by Hanover are reasonable. Dr. Corson testified that the 1955 prices, with the application of a proper index, were essential to the calculations. The 1955 prices have been adjusted to reflect economic conditions existing at the time the assumed purchases were made. The limitation that it could not be more advantageous to lease did not depress prices, because rents and royalties were not fixed or regulated. United had complete freedom to fix its lease terms and sales prices at any level. The limitation is not material to the reconstructed prices. The 1955 prices were not an assumption but a fact. The consumer price index used was also a fact.

Machine Shipments and Returns. United next argues that the Liedesdorf calculations include a practical suppression of machine returns, which occurred often, in that returns ". . . are treated most artificially through a series of accumulations until the totals accumulated reach the totals previously leased, when the deductions are made to show a putative transaction of indefinite character looking like a

re-sale . . . ," and whether or not this treatment favors United, the result is ". . . unjustifiable as a matter of principle in falsifying the facts concerning machinery returns by which the court and the parties are bound in the ascertainment of 'damages' "; that ". . . ignoring returns under Form A leases until cumulative returns had exceeded cumulative shipments, is only another indication that the Leidesdorf procedures rest on the speculation that every machine in fact returned could and would have been promptly sold upon a different market at an established price. . . ."

The argument is not clear and appears to misconstrue the manner in which machine returns were considered in the calculations. As a part of its approach, Hanover had to determine how many machines, if purchased, would have been required to maintain its production. Between 1939 and 1955 machines were received from United and returned to United. Hanover did not credit itself with the return of a machine because the shipment and return data showed the return in a particular year. This was in order not to take advantage of returns a lessee, and not an owner, might make because of cyclical fluctuations in production. Hanover credited itself with returns only to cumulatively offset shipments at a given time, and shipments were considered purchases only when shipments exceeded returns at a given time. This is reasonable and does not render the calculations speculative or conjectural. If Hanover had used individual returns, it would have increased the damages. United has not proved that a consideration of individual shipments and returns would decrease the amount of damages.

2. Elements Not Included in the Leidesdorf Calculations.

United attacks the Leidesdorf calculations because cost of capital, future worth and taxes are not included, and a proper index was not used.

Cost of Capital. The Leidesdorf calculations do not include cost of capital. Cost of capital is an economic concept which has been defined as "the rate of return expected by investors on capital funds they place at . . . [a concern's] disposal." Dr. Corson testified that a company usually gets its capital in four ways: debt, preferred stock, common stock and retained earnings, and that during the damage period Hanover derived its capital from the sales of common stock and retained earnings. He computed Hanover's cost of capital in two ways. First, he took the percentage of earnings per share to the price per share of common stock for the seven years (1940, 1941, 1942, 1948, 1949, 1950, 1951) in which common stock was sold. The weighted average was 22.14 percent. He also took the percentage of net profit after taxes to stockholders' equity for the years 1939 to 1955: This average was 14.1 percent. Using the 14.1 percent, Dr. Corson made certain adjustments to the calculations. He concluded that purchases would not result in an investment return greater than the cost of the capital invested, and that the purchases were economically unsound.

If cost of capital is a necessary element of the damage calculation, the rate used by Dr. Corson does not reflect the true cost that Hanover would have had to pay or offer to attract capital. The measurement of cost of capital is vague. "Quite apart from the practical difficulties of measuring capital cost for a specific company, there is today no explicit and generally acceptable account of what is the correct concept, actual approach to its measurement. . . . The best known exception is the work of Professor Joel Dean but

even his most comprehensive statement regarding the cost of capital is neither explicit nor complete." Solomon, *The Management of Corporate Capital*. Dr. Corson cited this work and that of Joel Dean in support of his testimony. "A person who desires neat solutions with one correct answer should avoid the computation of a corporation's cost of capital. Usually such an answer is impossible. If ten 'experts' independently computed the cost of capital of the IBM Corporation, there would be ten answers." Bierman & Smidt, *The Capital Budgeting Decision*. While Dr. Corson also cited this work, he disagreed with this particular view. Dr. Cyert, Hanover's expert, agreed with these authors, and listed other authorities who emphasize the difficulties in the measurement of the cost of capital.

The inexactness in its measurement is demonstrated by Dr. Corson's averages of 14.1 and 22.14 percent. The percentage of earnings per common share to price per common share ranged from 7.8 percent in 1940 to 54.5 percent in 1948. The percentage of net profit after taxes to stockholders' equity, while not fluctuating as sharply, ranged from a low of 6.72 percent in 1945 to a high of 32.59 percent in 1947. To demonstrate the inexactness also, Hanover suggests that the percentage of earnings per share to the sales price per share on a secondary issue of Hanover stock in 1956 was 8 percent. This was the first public sale of Hanover stock. Prior to that time, stock acquisition rights were limited to descendants of the original founders of the company, and certain key employees, and sales were at a discounted price reflecting book value after certain downward adjustments of capital and surplus in accordance with a predetermined formula. Both experts agreed that in measuring cost of capital in this way market value is used, and if there is no market value, then the market value

of stock of similar companies. Yet, Dr. Corson was satisfied with discounted sales to family and key employees. Mr. Spence, who for many years dealt in corporate stock and securities matters, testified that during the damage period Hanover's stock, if publicly sold, would have had a market value of a minimum of ten times earnings, and probably as high as 13 times. This would indicate a cost of capital of 8 or 10 percent. Mr. Spence's opinion was based in part on the market value of stocks of other shoe manufacturers. Dr. Corson thought that the 1956 public issue was not relevant to the damage period, and that the market price of stocks of similar companies were not material because his figures were the actual cost of capital experienced by Hanover. This ignores the fact that the bulk of the assumed purchases would have been in 1939. The evidence shows that these purchases would have resulted in a cost of capital different than that actually experienced during the damage period.

Hanover had other sources of capital. It made substantial loans in 1942 and in 1951 at interest rates of 2 to 2.5 percent. In 1942 it borrowed $300,000 without interest from two of its "family" stockholders. The borrowings were infrequent and for the most part relatively small—5.8 million during the same period, with 2.1 million the largest amount outstanding at any one time. ($535,000 is the approximate cost of the machines to Hanover in 1939.) Dr. Corson did not consider debt because he concluded it was not a principal source of capital.

Dr. Corson did not consider preferred stock as a source of capital. In 1946, Hanover issued 2.5 million of preferred stock with a 5 percent dividend. Dr. Corson said capital "was not derived in any significant part from preferred stock. . . ." It has enough significance so that it should not

have been ignored as an independent source. Moreover, in arriving at the 14.1 percentage, stockholders' equity, to which profit after taxes was compared, included preferred stock. Dr. Corson said this rate was "what the stockholders essentially earned on the money they had supplied and supplied either by the purchase of stock or by the retention of earnings. . . ." The preferred stock was non-participating, and, thus, to the extent that such profit exceeded the preferred dividend rate, it does not represent what preferred stockholders earned on their capital.

Dr. Corson admitted that his figures do not represent a cost in an accounting sense. He testified that a concern which has a cost of idle capital of 14 percent and which borrows additional capital at 2 percent, and invests it at a 10 percent return, makes a profit for income tax purposes, but suffers an economic loss. He testified that an economic loss and actual profit and loss are not the same, and that such an economic loss, while difficult to identify in the profit and loss statement in any year, in the long run will be reflected in the profit and loss statement. To include the cost of capital in Hanover's damage calculation would require an examination of the wisdom of every corporate investment. While Dr. Corson admitted that Hanover at all times had sufficient capital to purchase the machines, there is no evidence why Hanover borrowed from time to time. In many instances the loans were less than the amounts of the assumed capital purchases. Such a corporate decision to borrow funds, under Dr. Corson's testimony, would be unwise. It illustrates that a company may choose to act notwithstanding the cost of capital indicated that it should not.

Dr. Cyert, on the other hand, emphasized that the cost of capital is only a decisional guide which should form no part of a damage calculation.

In the Borden Co., 1962, 3 CCH Trade Reg. Rep. para. 16,191, a Federal Trade Commission case, Borden attempted to defend a charge of illegal price discrimination under the Robinson Patman Act on the ground that differences in prices resulted from differences in costs. One element of cost was "Investment Cost" which appears to be of the same nature as the cost of capital. The Commission rejected it as a proper cost item:

> "Respondent's cost study fails for other reasons. For instance, it claims an 'Investment Cost' difference of $.0404 per case. Respondent apparently kept larger inventories of Borden brand evaporated milk than of the private label. In its analysis, it concludes that the money invested at 8% resulted in an inventory cost of $.0835 per case for Borden brand and an inventory cost of $.0257 per case for private label. The fallacy in this position is that the so-called 'Investment Costs' is not an actual, incurred cost at all; it amounts to a return on capital investment. Accordingly, this item is rejected for cost justification. Cf. Thompson Products, Inc., 55 F. T. C. 1252, 1265-1266 (1959)."

On the record there is no clear measurement for cost of capital. Even if measurable, it is not a proper element of the damage calculation. Cost of capital is a guide, not rigid or inflexible, which with other considerations such as opportunity, preference, necessity and the like, may dictate action and policy. Cost of capital, other than interest on borrowed funds, is not an item of cost or expense that would directly affect Hanover's profits and losses in any year. The financial statements and the testimony of Dr. Cyert and Mr.

Spence, however, indicate that Hanover would have borrowed the necessary capital for the purchase. The calculations should be adjusted to reflect a 2.5 percent interest rate.

Future Worth. United argues that future worth is a mere matter of compounding the actual machinery investment at the appropriate cost of capital; that its application to the calculations is proper because "Anyone can see that, if Hanover could have put the purchase price of machinery in a savings account and obtained over 16 years a compounded return on its money at the rate of 14%, it would be folly to make the same investment in a purchase that would not earn at least that rate of return."

Future worth does not represent a cost to Hanover. The compounding of alternative investments at the given rate over a given period indicates which investment provides the greatest return. But again it is only a guide. It does not reflect other considerations such as opportunity, preference and necessity. It does not directly affect the profit and loss statements, and would not directly enter into the determination of profit and loss in any year. The damages will include interest on the borrowed funds. Future worth is not a proper element of the damage calculations.

Taxes. Any recovery by Hanover will be subject to taxation in its entirety. Commissioner of Internal Revenue v. Glenshaw Glass Co., 1955, 348 U. S. 426. The Leidesdorf calculations do not take into account tax consequences, such as deductions for rents and royalties, and capital gain treatment for machines disposed of at greater than depreciated book value. Generally in tort and in breach of contract actions taxes are not considered in assessing damages. The cases are collected in 63 A. L. R. 2d 1393 and 1433. In

Cereal Byproducts Co. v. Hall, 1958, 16 Ill. App. 2d 79, 147 N. E. 2d 383, the court held that an income tax refund received by plaintiff as a result of embezzlements should not be considered in mitigation of damages for defendants' failure as auditors to uncover the embezzlements:

> ". . . On defendants' theory every suit for damages would necessitate consideration of the income taxes saved by the plaintiff on account of the loss and the taxes payable on account of the recovery. The same principle applies as would apply in the event plaintiff had carried insurance against these embezzlements. Neither payments by the insurance carrier nor tax refunds can mitigage defendants' liability. The insurance carrier would have an interest in the recovery from the defendants just as the federal government has a tax interest in the recovery by plaintiff. We think that the court erred in giving defendants credit for the income tax refund."

In the trial on the separate issue, the late Judge Goodrich said: "Things which happen later and let an injured plaintiff escape some of the ultimate consequences of the wrong done him do not inure to the benefit of the defendant. . . ." 185 F. Supp. 826 at page 829, supra. The tax consequences are extraneous to the damage caused by United, and are not a part of the calculations.

Consumer Price Index. There is no price index for shoe machinery. Dr. Gorson testified that the Consumer Price Index was not proper for the conversion of shoe machinery prices because the index is constructed to measure commodities that wage earners and clerical workers "purchase as their cost of living", such as food, clothing, toys and the like; and that a more precise index would be a

"leasing cost index," which would "relate the prices of shoe machinery in 1955 to hypothetical prices—because that's what we are dealing with in the earlier years as the rentals in 1955 varied in earlier years." He did not detail the mathematics, but estimated under this index an increase by 20 percent of the excess of cost of ownership over cost of leasing, calculated after the inclusion of the omitted elements. His work papers showed that the computed net cost of ownership was $71,000 less than that arrived at through application of the Consumer Price Index. If the index were the only matter in issue, and Dr. Corson's index were used, Hanover would be entitled to an additional $71,000. However, through application of the omitted elements, this index produced a result by which a computed excess of cost of ownership over cost of leasing went from $949,720 to $1,169,366.[13]

Dr. Cyert testified that the Consumer Price Index is a reasonable indicator of the general price level and the general trend of prices, since it is based on a measure of the cost of living for a large segment of our society, and while there is no measure for everything that happens in our many dimensioned society, the index was reasonable and a proper one for this case. The Consumer Price Index resulted in a relationship of 1939 prices to 1955 prices of 51.9 percent. Using a leasing cost index based on the 20 major machines in the damage calculation, the percentage was 52.9. And with an index developed from United's prices for its optional machines the percentage exceeded 51.9 only in the case of two of the 58 listed machines. The application of the Consumer Price Index was proper.

[13]Using the Consumer Price Index and including the omitted elements, Dr. Corson had computed an excess of ownership costs over leasing costs of $949,720.

Expert Testimony. It is not clear whether United contends that expert testimony was necessary to prove all elements of the calculations. Whether expert opinion is required is a matter within the discretion of the court. Conry v. Baltimore & O. R. Co., 3 Cir. 1953, 209 F. 2d 422. Expert testimony is permitted if the court determines it is necessary to aid the fact finder in a full understanding of the issues. Steward v. Atlantic Refining Co., 3 Cir. 1957, 240 F. 2d 715. Expert testimony to support the calculations was supplied to the extent needed. Dr. Cyert gave his opinion on the propriety of certain elements used in or omitted from the calculations. The adverse opinion of Dr. Corson clearly defined the issues, so that the court is in a position to decide them. United's criticism of the testimony of Dr. Cyert is not supported by the record. Moreover, the underlying factual data was proved, and the assumptions on which the calculations were prepared were reasonable.

In William Goldman Theatres, Inc. v. Loew's, Inc., E. D. Pa. 1946, 69 F. Supp. 103, *aff'd per curiam*, 3 Cir. 1948, 164 F. 2d 1021, *cert. denied*, 1948, 334 U. S. 811, the trial court said:

> ". . . Naturally, the plaintiff could offer no record of past performance at the Erlanger. The defendants' wrongful conduct precluded it from doing so. In its place, the plaintiff produced complete data showing the business done and profits earned at each of the other first-run-theatres in Philadelphia, including the nearby Mastbaum, during the damage period. Is the evidence sufficient? . . .
>
> "I do not pretend that there is not an element of speculation or guesswork in making an estimate of probable profits on the evidence presented. The fact,

however, that only approximate accuracy is required by the decisions of the Supreme Court indicates that no one expects the impossible and that every estimate of what would have occurred under hypothetical conditions is bound to contain elements of speculation. But the evidence, I think, is sufficient on which to reach a reasoned conclusion the basis of which is relevant, informative and logically significant data."

The damage calculations, subject to an adjustment for interest and to the elimination of certain machines, provide an approach and rational basis for a reasoned conclusion.

3. Estoppel.

Hanover is not estopped from contending that cost of capital is a part of machinery investment because of the 1955 negotiations between N. S. M. A. and United. See 31 C. J. S. Estoppel, §§ 107 et seq. The discount table, on which the negotiated prices depended, was revised several times during the negotiations. Mr. Salinger, a United witness, testified that prices were arrived at "on a purely bargaining position" without regard to costs, values or any so-called "equivalency formula."[14] To facilitate agreement, the economic experts, all of whom argued for cost of capital, were finally excluded from the negotiations. There is no

[14]Andrews, Anthony & McLean—*Sales Prices for Outstanding Shoe Machinery*, at page 10: "For the limited purpose of fixing the starting point in the calculation of secondhand prices and without conceding its correctness for any other purpose, we accept the concept of 'economic equivalence' used in the Dean Report—that is, 'a set of lease terms and a sale price so related that it will be a matter of indifference to the shoe manufacturer if he acts solely in his economic best interests, whether he elects to lease or to buy' and 'an equivalent price is one that makes ownership costs just equal to leasing costs'." (Footnotes omitted.)

evidence that Mr. Sheppard, although a member of the N. S. M. A. negotiating committee, ever agreed with the cost of capital concept.

Dr. Robert N. Anthony's report *Shoe Machinery: Buy or Lease* issued as a guide to N. S. M. A. members also does not work an estoppel. Hanover considered the number of years required to return its investment. This is commonly referred to as the "payback method" which according to Dr. Anthony's report ". . . provides no way of measuring *how much* more . . . [than the investment a shoe manufacturer] . . . will get back. . . ." This approach is not a guide to the investment return. The only other cost of capital considered by Hanover in its evaluation was interest on borrowings.

4. Statute of Limitations.

United raises the Pennsylvania statute of limitations as a bar to the admissibility of the Leidesdorf calculations because they include machines on leases executed prior to July 1, 1939.

The Pennsylvania six year statute of limitations and the scope and meaning the Pennsylvania courts give to it in analogous suits govern this action. 12 P. S. § 31;[15] Chattanooga Foundry and Pipe Works v. City of Atlanta, 203 U. S. 390, supra; Gordon v. Loew's, Inc., 3 Cir. 1957, 247 F. 2d 451; Shapiro v. Paramount Film Distributing Corp., E. D. Pa. 1959, 177 F. Supp. 88, *aff'd* 3 Cir. 1960, 274 F.

[15]Although the statute of limitations is six years, the damage period is from July 1, 1939, to September 21, 1955, as a result of the tolling provisions of the Clayton Act, 15 U. S. C. A. § 16, prior to its amendment on July 7, 1955, and the Wartime Tolling Act, Act of October 10, 1942, c. 589, 56 Stat. 781, § 1, as amended June 30, 1945, c. 213, 59 Stat. 306.

2d 743. The time when the cause of action accrues, however, is a federal question to be determined by federal law. Momand v. Universal Film Exchange, Inc., D. Mass. 1942, 43 F. Supp. 996; Delta Theaters, Inc. v. Paramount Pictures, Inc., E. D. La. 1958, 158 F. Supp. 644.

In Cardinal Films, Inc. v. Republic Pictures Corp., S. D. N. Y. 1957, 148 F. Supp. 156, defendant granted plaintiff an exclusive license to distribute prints of 30 motion pictures, provided plaintiff ordered from defendant exclusively all prints required for distribution of the pictures. Defendant furnished plaintiff with 658 prints, and because plaintiff was unable to get the film processing done elsewhere, under the agreement, it brought an action charging defendant with monopolization, restraint of trade, and the enforcement of an illegal "tie-in" provision. It alleged that defendant charged higher prices for the prints than it charged to other purchasers of similar prints, and higher prices than plaintiff could have obtained from other film processors. The court held that the statute of limitations did not bar a recovery for prints furnished during the period not barred, pursuant to the license agreement which had been executed in the period barred:

> ". . . It appears that of the 658 prints of the licensed pictures furnished by defendant to plaintiff under the contract, only 46 were furnished within the four year period. Inasmuch as plaintiff complains of a continuing violation of the antitrust laws, only so much of his damages as are attributable to those 46 prints are beyond the bar of limitations, if he has a valid cause of action. The situation is not like those in cases involving a statute of limitations in connection with continuing conspiracies. . . . While action

> does not lie for a continuing conspiracy as distinguished from the overt act that puts it into execution, action does lie for a continuing violation such as is here alleged. . . . The continuing violation involves the defendant's conduct (if it be a violation) in continuing the practices complained of under the contract. If more affirmative action on the part of the defendant causing damage to the plaintiff is required, . . . it may be, as alleged in plaintiff's affidavit, the defendant's refusal to relieve the plaintiff of the restriction in the contract. At least an issue of fact on that point is raised."

United attempts to distinguish Cardinal Films because the license agreement was not self-executing—Cardinal was to order the films it would distribute. This distinction is without substance. The right to distribute the motion pictures was meaningless unless Cardinal obtained the prints. Cardinal could escape the consequences of this requirement only by not taking advantage of its contractual right to distribute the motion pictures. Both the Cardinal agreement and the Form A leases were executed prior to the limitations period. Both defendant (Republic) and United could have changed their conduct, which was a continuing violation of the law.

In Muskin Shoe Company v. United Shoe Machinery Corp., D. Md. 1958, 167 F. Supp. 106, which concerned United's Form A leases, the court held the antitrust injury was inflicted when the leases were executed, and that payments made during the period not barred by the statute, but pursuant to leases executed during the period barred by the statute, could not be included in the damage calculation. While a decision by another district court is entitled

to great respect, the Muskin decision to the extent that it supports United's contention will not be followed in this case. The court reasoned:

> "... Plaintiff's claim of damages with respect to each lease on which it may be entitled to recover will require a consideration of the difference, if any, between the payments called for by the lease and the payment or payments which would have been reasonable under competitive conditions at the time the lease was made. This consideration will require complicated calculations with respect to each type of machine and each date of leasing. If similar calculations had to be made for every date on which a payment under every lease fell due or was made, the detail would be overwhelming. The general rule is the common sense rule in this case."

The extent of the detail should not control the proof of Hanover's claim. This burden falls initially and primarily on Hanover, and United cannot escape the consequences of its acts because it put Hanover to the task of accumulating a mass of detail. Moreover, Hanover's proof does not constitute overwhelming detail. United had ample opportunity to question the Leidesdorf calculations. Also, in Muskin the damages and injury were alleged to be the result of the unreasonable rental charges. Plaintiff conceded the legality of the leases, while at the same time it sought to void the rentals by the antitrust action. Hanover's alternate damage claim, which is the unreasonableness of the rental and royalty charges, has been disallowed. Its primary damage claim is not an attack on these charges. The injury and claimed damage flows from a continuing violation of Hanover's right to deal in a free market. Recovery measured by the

difference between payments made after July 1, 1939, pursuant to leases executed prior to that date, and the assumed cost of ownership, is not barred by the Pennsylvania six year statute of limitations.

This conclusion finds support in other cases. In Streiffer v. Seafarers Sea Chest Corp., E. D. La. 1958, 162 F. Supp. 602, a conspiracy case, in speaking generally on the accrual of a cause of action under the antitrust laws, the court said at page 606:

> "Under these circumstances it is more appropriate to analogize the antitrust suit to actions for injuries to real property, and, in particular, to actions arising out of a continuing, but abatable nuisance, where the incidence of continuing damage may depend on speculative factors, including the uncertain operation of the seasons. In such cases, and in antitrust cases, the rule is that the cause of action accrues on the occurrence of actual damage, and successive damage gives rise to successive causes of action against which the statute of limitations will run as they accrue day by day." (Footnotes omitted.)

In Highland Supply Corp. v. Reynolds Metal Co., 8 Cir. 1964, 327 F. 2d 725, a non-conspiracy case, the complaint charged that defendant's 1956 acquisition of a company and its 1957 cutting of prices permitted it, in violation of Section 7 of the Clayton Act and Section 2 of the Sherman Act, to monopolize the florist foil market, which resulted in a loss of sales, lower sales, a prevention of normal increase in sales, and other consequences. The district court held the action was barred by the statute of limitations because the acquisition and price cutting actions, which caused the

injury, occurred more than four years prior to the filing of the complaint in 1963, even though plaintiff continued to suffer damages during the four years preceding the filing of the action. The court of appeals reversed:

> ". . . Appellant's complaint, liberally construed (as it should be under Rule 8(f), F. R. C. Pro., 28 U. S. C. A.), makes claim for damages because of appellee's violation of Section 2 of the Sherman Act, supra, during the entire time that Reynolds possessed monopoly power. The statute of limitation in respect to a private right of action under Section 5(b) of the Clayton Act, supra, 'beg (ins) to run when the cause of action (arises), and the cause of action (arises) when the damage occur(s).' Then only can the action be brought. . . .
>
> "Irrespective of the date of 'acquirement' of Arrow by Reynolds, or the first 'price-fixing' date as considered by the District Court, we must rule that the instant complaint reveals facts as to abuse of 'monopoly power' which under proper showing, injury and damage to appellant's business might possibly be established within the limitation period as provided in Section 5(b) of the Clayton Act. To hold otherwise, as the District Court rules, is to say that some damage that might have been sustained by appellant was barred before it accrued; i.e. before appellant sustained injury to its business or property because of appellee's continuous violation of Section 2 of the Sherman Act. The question is simply one of factual proof.
>
> "Damages claimed in a private antitrust suit must be different from those suffered by the general

> public—i.e. they must be special to the claimant. . . . It is existence of monopoly power and the exertion thereof on the business of a competitor, in a relevant market, that gives rise to such a claim. . . . Such right of action may arise from day to day. . . . It is well settled that where a private cause of action under the antitrust law is based upon a continuous invasion of one's rights, his cause of action accrues from day to day as his rights are invaded to his damage. . . ."

See also Delta Theatres, Inc. v. Paramount Pictures, Inc., E. D. La. 1958, 158 F. Supp. 644, 649; Susser v. Carvel Corp., S. D. N. Y. 1962, 206 F. Supp. 636, 651-2, *aff'd* 2 Cir. 1964, 332 F. 2d 505.

Both parties have cited cases involving an interpretation of the Pennsylvania two year statute of limitations in personal injury actions not resulting in death. 12 P. S. § 34. Hanover had a continuing right not to be injured in its business or property in the manner asserted under the facts of this case. The Pennsylvania statutes of limitations which involve continuing injuries to property limit the damage period to six years before the commencement of the action. See cases collected in Daniels v. Beryllium Corp., E. D. Pa. 1962, 211 F. Supp. 452, 455, n. 4.

Daniels was a diversity case in which Pennsylvania law was applied. Plaintiff became ill in 1949; her condition was diagnosed in 1953 as beryllium poisoning, and the action was filed on July 1, 1958. In considering the limitation in 12 P. S. § 34, District Judge, now Circuit Judge, Freedman held that the statute began to run in 1953 and the only recoverable claim was for the additional poisoning that occurred between July 1, 1956, and July 1, 1958. There is no

question that if the action had been started within two years of 1953, there would have been recovery for the period from 1949. There is no evidence that Hanover knew or should have known of United's illegal monopolization before 1939. United's charge that Mr. Sheppard knew of United's wrong since 1921 is not supported by the record which shows only that he was dissatisfied with United's policies. Even if Mr. Sheppard did know prior to 1939 that United's acts provided a basis for a cause of action, as long as United continued to monopolize the shoe machinery market Hanover could bring an action for the continued monopolization within the six year period, just as the plaintiff in Daniels could bring an action for the continued contamination within the two year period.

The Pennsylvania six year statute of limitations does not render the Leidesdorf calculations inadmissible.

5. The Passing-On Defense.

This contention is that since Hanover paid the same lease charges as its competitors, and passed these charges on to its customers, there has been no damage. United insists that the ruling of Judge Goodrich that the passing-on of damages is not a defense in this action (185 F. Supp. 826, supra) does not foreclose this court from deciding on the facts that no damage was sustained, because Judge Goodrich assumed an antitrust violation, assumed excessive charges amounted to injury, and did not get to the issue of whether the damages were in fact passed on.

United relies on Judge Goodrich's statement that "The Court thinks this argument [of passing on] is invalid; otherwise, it would be necessary to go into the evidence concerning the factual accuracy of the argument." Judge

Goodrich also said, ". . . that where the plaintiff is a consumer of the product, rather than a middleman who resells it, he may recover the excess paid whether or not he has ultimately passed the excess along to his customers." Moreover, the hypotheses on which Judge Goodrich proceeded have been proved in this trial. His decision is controlling.

United argues, however, that the distinction between a middleman and a consumer, on which Judge Goodrich based his decision, and which was reaffirmed in Freedman v. Philadelphia Terminals Auction Co., 3 Cir. 1962, 301 F. 2d 830, is an unsound distinction, and that the correct principle is that adopted in Wolfe v. National Lead Co., 9 Cir. 1955, 255 F. 2d 427, *cert. denied* 1955, 350 U. S. 915. The Third Circuit cases will be followed. See also Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., N. D. Ill. 1963, 225 F. Supp. 332, *aff'd* 7 Cir. 1964, 335 F. 2d 203; Atlantic City Elec. Co. v. General Elec. Co., S. D. N. Y. 1964, 226 F. Supp. 59.

F. Laches.

United cites Tobacco and Allied Stocks v. Transamerica Corp., D. Del. 1956, 143 F. Supp. 323, *aff'd* 3 Cir. 1957, 244 F. 2d 902, and Royal Air Properties, Inc. v. Smith, 9 Cir. 1962, 312 F. 2d 210, for the proposition that the doctrine of laches is a defense to a suit at law to enforce a federally created right. Neither of these cases supports that proposition. Both involved claims pursuant to Section 10 of the Securities and Exchange Act of 1934, and Rule X-10B-5 of the rules issued by the Securities and Exchange Commission, which provided for both legal and equitable remedies. In Tobacco and Allied Stocks, the court held that the enforcement of rights under a section allowing both legal

and equitable relief could be limited by both the statute of limitations and laches. The court of appeals affirmed without specifically deciding the question of whether the statute of limitations, or laches, or both, governed.

The rights accruing to Hanover under Section 4 of the Clayton Act are enforceable only at law. Fleitmann v. Welsbach Street Lighting Co., 1916, 240 U. S. 27 (this case involves a predecessor to Section 4 of the Clayton Act). Burnham Chemical Co. v. Borax Consolidated Ltd., 9 Cir. 1948, 170 F. 2d 569, *cert. denied* 1949, 336 U. S. 924. As stated in Tobacco and Allied Stocks, supra, "[W]here the action is termed one at law for which only legal remedies are available, the court will look to the local law of limitation. . . ." United has cited no case, and research has disclosed none, where laches was applied to a case at law in which damages were sought and no equitable remedies were available. Laches is not a defense. Therefore, a discussion of Hanover's conduct is not required. It is sufficient to say it did not constitute laches.

G. Conclusion and Computation of Damages.

This court has jurisdiction of the subject matter of this action and of the parties hereto (15 U. S. C. A. § 2; 15 U. S. C. A. § 15). United violated Section 2 of the Sherman Act (15 U. S. C. A. § 2) by monopolizing the trade and commerce among the several states in shoe machinery, other than dry thread sewing machinery. As a result of United's unlawful monopolization, Hanover was required to pay more for the use of the shoe machinery it needed and used than it would have been required to pay in a free and competitive market. As a result of United's unlawful monopolization, Hanover was injured and sustained dam-

ages. The period of time for which Hanover can recover damages is July 1, 1939, through September 21, 1955.

An order will be entered requiring Hanover to recompute its damages. This court adopts $1,830,640 as the starting point. This is the average of Hanover's three sets of calculations, as adjusted to reflect the changes in Hanover's Exhibit P-123. Each set of calculations is to be adjusted to exclude damages for the following machines for the periods indicated, because comparable machines were available to Hanover from non-United sources.

Machine Type	Period
Upper Leather Clicking Machine	1950-1955
Sole Leather Dieing Out Machine	1941-1955
Sole Laying Machine	1951-1955
Outsole Rapid Lockstitch Machine	1939-1955

The calculations are to be adjusted to include interest of 2.5 percent, to be computed by the same method used by Hanover in its Exhibit P-53. The calculations as adjusted are to be averaged and the resulting figure submitted to the court.

/s/ MICHAEL H. SHERIDAN
Chief Judge
Middle District of Pennsylvania

Dated: APR. 28, 1965

Notice of Motion

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that pursuant to Rule 59 of the Federal Rules of Civil Procedure and 28 USC § 1651(a) and upon the findings of fact, conclusions of law and opinion filed April 28 1965, the annexed affidavit of Ralph M. Carson sworn to June 9 1965 and exhibits thereto, the annexed transcript of colloquy and ruling of the United States District Court for the District of Massachusetts, Wyzanski J. on May 28 1965 in *United States* v. *United Shoe Machinery Corporation* (CA No. 7198) and upon all prior proceedings, defendant will move June 17 1965 at 2:00 p.m. in the United States District Court for the Middle District of Pennsylvania in the Post Office Building in the City of Harrisburg, Pennsylvania before Hon. Michael H. Sheridan, Chief Judge,

(1) for a new trial on the issues relating to the findings and decree in said Government case (as described in the opinion herein at pp. 12-17, 23-27 and 37-39); and in connection therewith

(2) for remission or certification by this Court to the United States District Court for the District of Massachusetts, in accordance with its jurisdiction reserved in par. 23 of the decree in said Government case, of the questions

(a) whether said decree, together with the opinion, findings and conclusions in the case, determined the existence before its effective date June 23 1954 of any legal duty or obligation on the part of defendant to offer for sale its leased machines;

(b) whether before the date January 1 1955 fixed pursuant to the decree any legal duty or obligation existed on the part of defendant to offer for sale its machines theretofore offered for lease only;

(c) whether the lease-only system of the defendant as applied in the period 1939-55 was in itself, and independently of the four restrictive clauses or practices described in par. 4 of the decree in the Government case, a violation of the antitrust law within the meaning of the decree, together with the opinion, findings and conclusions in the Government case; and

(d) whether the provisions of the decree in the Government case requiring changes in defendant's business practices and action to be taken with respect to the existing leases were, in their adjudicatory effect and operation, retroactive or declaratory of pre-existing rights and obligations as between defendant and its lessees or customers or were instead prospective and remedial only;

(3) for amendment of the findings of fact, conclusions of law and opinion filed herein on April 28 1965, and the entry of new findings of fact and conclusions of law directing dismissal of this action, on the merits;

together with such other and further relief as may be proper.

Dated: New York, N. Y.
June 9 1965

DAVIS POLK WARDWELL SUNDERLAND
& KIENDL

By R. M. CARSON
A Member of the Firm

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Affidavit of Ralph M. Carson Read in Support of Motion for Partial New Trial

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

RALPH M. CARSON, being duly sworn, says:

I am a member of the firm of Davis Polk Wardwell Sunderland & Kiendl, attorneys together with Messrs. Warren, Hill, Henkelman & McMenamin of Scranton, Pennsylvania for defendant in this action, and tried the case on its behalf. This affidavit is made in support of defendant's application for a new trial upon that part of the issues covered by this Court's construction of the controlling Government antitrust suit (opinion pp. 12-17, 23-27 and 37-39), upon the grounds (a) that the voluminous record in the Government case (14,194 pages of transcript covering 121 trial days: 110 F. Supp. at 299) shows such construction to be erroneous and (b) that the trial judge in the Government action, Hon. Charles E. Wyzanski, so indicated in a hearing therein May 28 1965.

1. The controlling effect of the findings and decree in the Government case, as regards the decision of this Court, is indicated by the opinion at p. 12:

> "Hanover relies primarily on the decree, findings, conclusions, and opinions in the Government case, as proof of United's illegal monopolization of the shoe machinery industry in the United States, pur-

suant to Section 5 of the Clayton Act, 15 U. S. C. A. § 16, which provides:

> "(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the anti-trust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: . . .' "

2. This Court's construction of the decree, findings and conclusions in the Government case, which is of course an essential basis of the liability indicated by the opinion filed April 28, seems to find in the Government decree an implied duty on defendant's part to offer its shoe machinery for sale in the period 1939-55, and also to find therein a determination that defendant's lease-only system in that period was illegal in itself.

3. This decision is respectfully submitted to be erroneous and to justify and require a new trial upon the particular issue——

(a) upon the grounds previously urged;

(b) upon the language of the decree itself, which is not ambiguous, hence does not require interpretation from the language of the opinion, findings and conclu-

sions, and excludes from its determination the lease-only system as such and any pre-existing duty or obligation to offer for sale;

(c) upon certain passages in the voluminous trial record in the Government case, which are referred to in par. 6 of this affidavit and which have not been heretofore called to the attention of the Court; and

(d) upon the indications given by Judge Wyzanski at a hearing in the Government case in the District of Massachusetts May 28 1965, appearing in the transcript attached hereto as Annex 1.

4. The Government case is presently the subject of proceedings before Judge Wyzanski in the District of Massachusetts pursuant to decree par. 18, which requires a report to the Court as of January 1 1965 concerning the effect of the decree, with a view to possible modification at that time. Both the Government and defendant have filed reports and petitioned for modification.

In view of this Court's decision herein filed April 28, defendant on May 21 1965 gave notice to the plaintiff herein and to the Government of an application to construe or amend the Government decree, in so far as dealt with in this Court's decision, pursuant to the reservation of jurisdiction in the Government decree as follows:

"23. Jurisdiction of this cause is retained for the purpose of enabling either of the parties to apply to this Court at any time for such further orders and directions as may be appropriate for the correction, construction, or carrying out of this Decree, and to

set aside the Decree and take further proceedings if future developments justify that course in the appropriate enforcement of the Anti-Trust Act."

This application was made returnable before Judge Wyzanski in the District of Massachusetts May 28 1965. The proceedings thereon are set forth in Annex 1 hereto.

As shown by Annex 1, Judge Wyzanski declined to make the construction or amendment of his decree for which defendant applied, as a matter of comity and deference to this Court. However, he at the same time both (a) plainly intimated that this Court's construction of his decree herein was erroneous and (b) indicated a willingness to certify his opinion to this Court upon request in the manner now being developed for the consultation of State courts with respect to State law by Federal courts.

(a) *Indicated error in this Court's construction.* The most important passages appear in the following expressions of Judge Wyzanski at the hearing of May 28:

"THE COURT. But, I take it for granted, that the Department of Justice remains true to what it describes on the walls of its buildings with respect to its interest in having justice done as distinguished from merely prevailing. And I suppose you have no more doubt than Mr. Carson has as to what was my intention when I entered the Decree. Have you any doubt?

MISS BRASS [Attorney, Department of Justice]. We have no doubt, your Honor, at all.

THE COURT. Have you thought it fit to tell Judge Sheridan that you have no more doubt than Mr. Carson about what the whole nature of the proceeding was?" (Annex 1 p. 27)

"THE COURT. But don't you think Judge Sheridan might wrongly misconstrue your appearance hereby assuming that you thought that Mr. Carson was mistaken on his ultimate point as to how I looked at the matter when I decided it?" (Annex 1 pp. 27-8)

"THE COURT. . . . Now that you are here, are you not aware from being here on previous occasions that the government never contended, and I never ruled, as Judge Sheridan supposes the matter was decided? Are you not aware of that?

MISS BRASS. Well, your Honor——

THE COURT. I ask you as a lawyer, on your honor as a lawyer.

. . . .

THE COURT. I am just asking you, and I will hold it as a statement of your character as well as your competence." (Annex 1 pp. 28-9)

". . . I cannot understand how any person who was familiar with the whole course of this litigation could have any doubt whatsoever as to what had been my view of the conduct of the defendant, of the degree to which it had violated the Act and the degree to which the Decree was addressed beyond eliminating violations to setting forth a program of future conduct which would make it hereafter less likely that the violations could continue." (Annex 1 p. 39)

(b) *Suggestion re certification.* In this connection Judge Wyzanski said:

> "THE COURT: I have another question. If it be the kind of doubtful issue which a distant Court might desire to receive illumination on from the local Court, why could you not ask that distant Court to proceed in the manner which, as we now know the Supreme Court encourages Federal Courts to act with regard to State matters as to which the Federal Court may be uncertain as to how the State Court will decide it by getting a light in advance of a determination?" (Annex 1 pp. 22-3)

5. It is submitted that the foregoing passages make it perfectly clear that in the opinion of Judge Wyzanski this Court's construction of his decree with reference to the points stated in the notice of this application for new trial, is erroneous and not in accordance with the true meaning and intent of the decree, findings and conclusions—so much so that Judge Wyzanski expressed surprise and disappointment at Government counsel's having failed to concede this fact. The position of Government counsel, as the Court will note, was that——

> "I am not here today to argue the merits of the matter. I was instructed merely to make the point to your Honor, that this should not be entertained." (Annex 1 p. 29)

If this Court should be in any doubt concerning the significance of the language above quoted from Judge Wyzanski, then it is respectfully submitted that a formal remission of the pertinent questions to Judge Wyzanski is appropriate and is indeed necessary to avoid a miscarriage of justice. The language above quoted from the transcript

of May 28 indicates that Judge Wyzanski would act upon the appropriate inquiry from this Court. Moreover, this Court's attention should be called to the fact that plaintiff must have been guided by the thought of a deviant construction of the Government decree, in the choice of forum advised by counsel, since the fee application of counsel, undated but filed May 28, contains the statement (p. 7):

> "Legal services included . . . preparation of complaint and decision as to jurisdiction in which it was to be filed".

While plaintiff was perfectly entitled to select this Court as the forum for its treble damage suit, the Court's attention is invited to the fact that the choice cannot have been based upon convenience of the parties, and must have been dictated by questions as to the meaning of Judge Wyzanski's decree. As to the convenience of the parties the Court has too fully in mind to require detailing here the relevant facts; viz. trial counsel on both sides from New York, importation of the Southern District Court Reporters for the transcript, conduct of the trial for 12 days in the United States Court House for the Southern District of New York by special arrangement. As to the meaning and application of the decree on the other hand, this record shows that Hanover's counsel, when representing in 1954-5 National Shoe Manufacturers Association (of which Hanover was a member), had had experience with Judge Wyzanski's application of the decree. In particular, a partner of the firm representing plaintiff in conference with the defendant pursuant to decree par. 9 expressed the view that the outstanding or Form A leases had been declared by

Judge Wyzanski to be illegal (PX 79 p. 12). This statement not only was contradicted by defendant's General Counsel, Mr. Todd (PX 79 p. 14), but is also contrary to the view of his own decree held by Judge Wyzanski (110 F. Supp. at 344, 349, cf. Judge Thomsen's statement to that effect in the *Muskin* case 167 F. Supp. 106, 111).

Our inference would be that this Court was selected by Hanover counsel for this treble damage action in the hope that the decree would receive a more benevolent interpretation for plaintiff's purposes than it would receive at the hands of the author of the decree in the District of Massachusetts. This is what might be called legitimate "forum-shopping". Where however such great stakes turn on the proper interpretation of the Government decree, it is suggested that this Court should be peculiarly sensitive to the possibility of a misinterpretation here and should refer to the District Court of Massachusetts for its construction of the decree on the points here relevant.

6. The District Court of Massachusetts is the repository of the voluminous record and extensive exhibits in the Government case. It is impossible in the time available to bring to this Court's attention everything therein relevant to the construction of the Government decree which we had believed to be unambiguous. In support of this application, there are submitted two important points in the record of the Government case which were not heretofore brought to this Court's attention.

(a) *Combination of liability and relief in single trial.* References in Judge Wyzanski's opinion to matters of relief, like the sale of shoe machinery, are explained by the fact

that the Judge combined in the same trial matters affecting both violation and remedy. This is shown by the following passages from the record:

> "The COURT. I am going to explain why I am going to overrule that objection. In the hearings which are now being conducted, I am concerned not only with the question whether the defendant violated the law, but if the defendant violated the law, what is the appropriate remedy. The situation in the industry is important at least for the second of those two questions.". (November 20 1950, Tr. 3010-1)
>
> "The COURT. I would like to say to you from the beginning I have said this was a hearing upon remedy and relief, if any remedy and relief were allowed, as well as upon the question of liability or violation of the statute and though I am aware there are some Judges in recent years who have divided the proceedings into two parts as you suggest, that course has never been followed by the Judges for whose opinions and procedures I have the highest respect. I refer you to the practice followed by Judge Augustus Hand and Judge Learned Hand, sitting in the Southern District of New York as District Judges and sitting as specially assigned District Judges in other cases since they have been sitting on the Court of Appeals." (May 15 1951, Tr. 11723-4)
>
> "The COURT. . . . I am clear, despite Mr. Malloy's non-recollection, what I always said, there would be one trial and that I made it plain I would not hear in two stages the question of liability, if any, and relief, if any, and I cite the whole of the record for that." (June 20 1951, Tr. 13617)

(b) *Separate treatment of questions of machinery sale.* The fact that the sale of defendant's shoe machinery was taken up by Judge Wyzanski solely under the head of remedy, to operate *in futuro* only, is demonstrated in an extensive passage from the Government trial record, containing the Judge's summary of the case at Tr. 11725-36 on May 15 1951, which is attached to this affidavit as Annex 2. This analysis by Judge Wyzanski of the extensive record before him at that time clearly shows the separation of the sale question from other questions in the case, and shows the entirely *prospective* operation which the Judge had in mind for a requirement of sale of machines after liability should have been determined and subject to its being determined. This Court's attention is called particularly to the following language of Judge Wyzanski (Tr. 11734, 11735):

> "Now I pass to the third main division of the case, as I see it, and that is, suppose—and nothing more than suppose—that the Court should find that there was a monopoly prohibited by the anti-trust laws . . .
>
> The very difficult problem will arise of what the Court ought to do to bring about a competitive situation. . . . What would be the consequence of a situation in which the company was required to offer for sale every machine, but at its option the company was free to propose a lease upon economically equivalent terms?"

The fact that Government counsel themselves considered the question of sale of defendant's machines as a prospective

remedial measure, not dependent upon the determination of prior "culpability", is shown among other things by the following language used by Mr. Timberg, Government counsel, in the presence and hearing of Miss Brass in the closing argument on June 11 1952 (Tr. 14058):

> "The legality or illegality of an individual industry practice, standing by itself, is, from a relief standpoint, in a monopoly case, a matter of indifference. A fortiori, to devise a relief in terms of the gravity or the lack of gravity of the restraint of trade involved, is to inject into an equity relief proceeding issues of the type that I think both we and the defendants might want to exclude from consideration, to wit, issues relating to questions of punishment or punitive relief. Evaluation of moral or legal iniquity would obscure rather than clarify what I think this Court has referred to as the delicate and complicated economic issues raised by this case. The remedial relief for which the Government is contending is intended to give an economically justifiable resolution to an economic condition or state of affairs. Such remedial relief does not depend upon the evaluation of the gravity or culpability of the individual practices engaged in by the defendant, and is not geared into such an assessment or evaluation.
>
> In sticking to this remedial and non-punitive approach to the problem, incidentally, I am hopeful of being able to avoid such archeology of the case as does not illuminate or explain the present, to paraphrase Justice Jackson's language, and perhaps to supply some help to the Court in charting appropriate relief."

Affidavit of Ralph M. Carson Read in Support of Motion for Partial New Trial

WHEREFORE it is prayed that pursuant to Rule 59 a partial new trial be granted in the manner set forth in the annexed notice of motion, and that defendant have such other and further relief as may be just.

(Sworn to by Ralph M. Carson on June 9, 1965.)

Annex 1 to Affidavit of Ralph M. Carson

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

C. A. No. 7198 WYZANSKI, *D. J.*

UNITED STATES OF AMERICA

v.

UNITED SHOE MACHINERY CORPORATION

Hearing re:

APPLICATION FOR CONSTRUCTION OR AMENDMENT OF DECREE

Appearances:

Margaret Brass, Esq., Antitrust Division, Department of Justice, attorney for the plaintiff.

Robert Proctor, Esq. and Ralph M. Carson, Esq., attorneys for the defendant.

Breck P. McAllister, Esq., attorney for The Hanover Shoe, Inc. as amicus curiae.

Benjamin A. Trustman, Esq. and John R. Hally, Esq. attorneys for New England Association of Shoe Manufacturers, as amicus curiae.

Federal Building,
Court Room No. 6,
Boston, Mass.
May 28, 1965.

[2] The Clerk: Civil Action Number 7198, United States of America against United Shoe Machinery Corporation.

The Court: Good morning, gentlemen. All counsel from outside the Commonwealth are welcome to participate without any special motion or the like.

I have read, of course, all the papers which have been filed, and you may assume that I have given some thought to the problem. I will be glad to hear you in any order that seems appropriate. I should think Mr. Carson would want to speak first, and then, I suppose, the government and then, I suppose, some of the amicus curiae may or may not want to be heard.

Mr. McAllister: Your Honor, I have a brief memorandum.

The Court: I thought I had one from you. All right. I have a two-page something or other.

Mr. McAllister: I don't think you have this one, your Honor.

Miss Brass: You have a two-page memorandum from the government, your Honor.

Mr. McAllister: It is very brief.

The Court: I had some pleadings, Mr. McAllister. You had a petition to appear as amicus curiae.

[3] Mr. Carson: May it please the Court, in view of your Honor's not only having read but, I am sure, absorbed the papers I would not at this time, at least, unless your Honor has questions, reiterate the submission we have made in our application and in our brief, which was left in your Honor's chambers yesterday. I would rather at this time address myself to what I conceive to be the grounds of our position both in the government's brief and Mr.

McAllister's memorandum which are in substance that, as the government says, this Court should not entertain jurisdiction because Judge Sheridan had exercised jurisdiction or, as Mr. McAllister says, this is but a collateral attack on the judicial proceedings of another District Court on this decree, both of which perhaps add up to what may be in your Honor's mind, that the application is belated.

Why was it not made before? And I would like to address myself to that. It was not made before because this defendant from its knowledge of the record in the long case before your Honor could not conceive that that case tried out the rights of shoe machinery lessees, neither a party before the Court nor represented by the government. That case accused the defendant of monopolization, which is to say wrongful exclusion of its [4] competitors, shoe machinery manufacturers; and that, therefore, in your Honor's determination, as affirmed by the Supreme Court, there is primarily the element of prospective action, correction of what your Honor held to be a wrong or illegal business situation; and that at no time, express or latent in the record and decision was there a holding of a duty on the part of United to sell its machinery to its lessees before 1953 or 1955.

Now to our very great concern two of the machinery lessees did proceed to attempt to recover treble damages in other Courts on the basis of an implied or an adjudicated duty to sell. We resisted those.

One was in the Western District of New York. We would call your Honor's attention to the decision of Judge Burke in which he said, among other things, "The policy of lease only was not by itself illegal."

The other was the Hanover case. And the curious thing is they proceeded or they began in the same year, 1955. They

were upon allegations identical as to the complaints except for the names of the parties and the amounts involved. Coon as well as Hanover claimed a right of purchase and a duty to sell and invoked your Honor's decree in support thereof. And in the Coon case the Court held no such thing existed.

[5] Now this decision, which was rendered April 12, 1963, was called to the attention of Judge Sheridan, and it came down just before the oral argument in the Hanover case, which was May 2, 1963, and thus two years before the decision was filed. When the decision was filed, this was the first indication we had that a Federal Judge would take seriously the contention that your Honor's decree implied or perhaps determined a pre-1955 duty and obligation to sell.

This concerns us not only because the implications of such a decision pecuniarily are enormous but because of the peculiar eminence or authority given to this Court's decision by Section 5 of the Clayton Act under which our adversaries proceeded.

This, as your Honor knows, makes the final judgment in this case prima facie evidence against the defendant in any action or proceeding brought by any other party, that is by Hanover, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto. That is to say, the judgment of this Court under the Clayton Act speaks as it were urbi et orbi to all Federal Judges entertaining jurisdiction under the treble damage clause.

Now Miss Brass' brief, citing the American [6] Securit case, is directed to the point that Judge Sheridan had jurisdiction. This we concede. The contention is unnecessary.

The question here is whether it is now right and fitting and, as we would submit, necessary that this Court exercise its interpretive power to determine the exact confines and bounds of the judgment, which is made by Act of Congress an estoppel between the parties. The American Securit cases, your Honor, are intriguing. We thought of dealing with them in our brief. We feel they are so much on our side I would like to deal with them orally, and your Honor has the citation in Miss Brass' brief.

Now I would draw, in line with what I have just said, this cardinal distinction between that group of cases and the issue before your Honor. The various plaintiffs concerned in those cases with the construction of Judge Kloeb's decree in the Toledo Glass case were suing for patent infringement. They were not invoking the special statutory sanctions of the Clayton Act, Section 5. Judge Kloeb's authority, as the Judge having jurisdiction by virtue of a consent decree, was not given that eminence and that control that Congress has given your Honor's judgment. Further, the Glass cases involved [7] the construction of a decree in a manner in which, while Judge Kloeb construed it, he declined to exercise an exclusive jurisdiction.

He said in 1958 Trade Cases, "The Court feels itself secure under its attempt to obtain the view of this Court as to the validity of its practices under the Consent Decree is properly here. It is doing what it had a right to do under the Decree. Maybe it can be criticized for not having done it eight years ago, but there was no occurrence at that time or since that time and up to the present time that would have caused it to come in here to seek a construction of the Decree." That is at page 74,489.

Then on the same page, he holds that his Decree is not violated by the package license practice that the petitioner

has followed. It is in that respect that other Courts quoting the Decree in haec verba point out that the Decree seems to prohibit that very practice, and for that reason they declined to allow the enforcement of the patents.

However, Judge Kloeb was asked in the same construction proceeding to assert an exclusive jurisdiction. At page 74,491 he recited the clause or the proposal that he should have sole jurisdiction to determine whether the [8] petitioner has violated the Decree, and he said, "I don't want to go on record as making any such statement as that."

Therefore, at the time these other Courts, in the Third Circuit, took the problem, they had not only the construction of Judge Kloeb but the refusal to attempt to exercise any authority with respect to the universality of that construction. Again I mention that by statute your Honor's judgment is given a certain universality.

The opposing brief has quoted Judge Leahy in the American Securit case, on the trial, and has terminated the quotation at the point on which I would particularly rely.

Judge Leahy says, at page 896 of 154 Federal Supplement, that the Ohio Court had refused to accept jurisdiction on certain other applications with respect to the Ohio Decree. It says that this Court now has confidence to test plaintiff's adherence to the obligation, and then it says, and this is quoted in the government's brief, "If the Decree is wrongly interpreted, or the consequences which flow therefrom are wrongly judged, the power rests with a higher body to set it straight."

This is the point urged upon your Honor by the [9] government and by Hanover as amici here. And, of course, there is power in the Third Circuit Court of Appeals, and it will be invoked, to endeavor to correct Judge Sheridan's interpretation of your Decree. But we feel we should be

blameworthy, if we did not bring the question here before judgment was entered, because I strongly suspect that my ingenious adversaries would say to the Third Circuit Court of Appeals, "If Judge Sheridan was wrong as a matter of interpreting Judge Wyzanski, why did not the defendant go to Judge Wyzanski while the case was still open?"

We are then here, and we point out in contra distinction from the passage I have just read and its application to this case the following two sentences which Judge Leahy thought important on page 896. He says, "The final judgment of the Ohio Court was not an adjudication of issues of fact or law in that action." In other words, it was a Consent Decree and not an adjudication made by the Master of the judgment.

He goes on, "It did not"—that is, the Ohio Decree—"It did not constitute evidence or admission of any such issue"—there again differing from your Honor's judgment—which constitutes evidence or admission of an issue by the very provision of the Act of Congress.

[10] I have called your Honor's attention to the recent decision of the Supreme Court as to the question of the right of construction or modification of an antitrust decree, and there again a Consent Decree, in the Columbia Artists' case where curiously enough the government took the position initially that it takes here before this Court. Here the government says that the application to construe should not be entertained by this Court. In the Columbia Artists' case the government said the Court had not jurisdiction and should not entertain the application to construe. Interestingly enough also the government in the Supreme Court treated the alteration in the Decree, which Judge Tyler had made, as a mere construction.

It said at page 5 of its Motion To Affirm, which has just been granted, "Despite some ambiguous expressions in the Opinions, the effect of the District Court's action is not to change the consent judgment when properly construed, and its Order does not constitute a modification."

The Supreme Court affirmed, that is six Justices, a majority, affirmed per curiam, without an Opinion. The minority of three, in the passage to which I have called your Honor's attention, treated the alteration in the [11] Decree by Judge Tyler as a modification and expressed some doubt as to whether it should be done in that way. I call that to your Honor's attention as indicating that whether our application be a modification, or called a modification, or truly an interpretation and construction of what your Honor has done, the way equally lies open to the government itself and it has found itself in a position to adopt either course.

I think now I can come to a very short reference, your Honor, a concluding reference to the equity and the grounds of this application. This plaintiff has been held, in the Opinion of the Middle District, to be entitled to enormous damages, as trebled, on the theory that this plaintiff had in the period under review by this Court a right of purchase of shoe machinery. In so far as that is an independent judgment and conclusion of the Middle District, of course, we cannot complain here.

The reason we are here is because we are convinced, and we have adduced the passages from the Opinion to your Honor in our brief, that the Judge in the Middle District has availed under the Clayton Act of language and perhaps holdings in your Honor's Opinion which it has misapplied in relation to the actual issues before the Court and to the record that was made, a very long record, [12] as your Honor knows so well.

This particularly comes out in the excerpt I have attached to our brief from the proceedings on the 101st Day, in which your Honor has outlined comprehensively for counsel the three issues before the Court, and treated the right to purchase or the duty to sell as the third branch that comes up at the end of all other branches, and as an expedient, if it be an expedient, to reduce defendant's market share.

There is no holding, we believe, nor an intention to hold, that the Court's condemnation of the lease-only system imported a correlative duty to sell in the pre-1955 period.

It is, of course, a little supererogatory to argue these points to the Court because your Honor really knows the inside and the intentions of this judgment and opinion. But as I read it and I invoke your Honor's determination, the condemnation of lease-only was tied in with all the elements in the lease, the four restrictive practices.

Your Honor's Decree, paragraph 4, singled out those four elements as means, and I don't say *the* means but means of monopolization.

It is a warping and a fragmentation of the [13] judgment to take lease-only separate from those means as an act of monopolization, which by inferential reasoning imports a pre-1955 duty to sell. I don't think your Honor intended so to hold. The proceedings in this Court indicate that it was not litigated.

And it is indeed surprising, and I think it should be more surprising to your Honor, who heard the witnesses, to be told at this stage by the Judge in the Middle District that the numerous shoe machinery lessees who came here and testified they were satisfied with the leasing system, and advocated its advantages, that these were people who

inferentially were being injured all the time by the refusal to allow them to purchase.

In fact, limiting myself to Judge Sheridan's opinion, which is before your Honor, I think I can say that Mr. Shepherd, the President of Hanover, had told United's counsel that he was willing to testify on United's behalf in the trial before your Honor. He was not called. We, of course, cannot say what he would have said, but he did not express, as Judge Sheridan relates the evidence, any objection to an inability to purchase at that time.

I believe from a reading of the record your Honor must have felt that as these witnesses proceeded across the stage the repetition and cumulation were [14] becoming a little burdensome, and I drew the impression from reading the evidence that your Honor may have thought the extreme satisfaction of the shoe machinery lessees as a class with the leases was an additional argument that the lease system had excluded competitors, that is shoe machinery manufacturers.

But I must say I was shocked and startled to have it held that these people who so testified were grievously wronged parties to the tune of the Hanover claim of $5,000,000.

I add a word about retroactivity. I cited in our brief Justice Cardozo's luminous language in the Great Northern Railway case, 257 United States, as to the power of the Court—I think it is 257 United States.

The Court: I am sure it is not 257.

Mr. Carson: It is not 257.

The Court: No. It may be 287 but he was not sitting at 257.

Mr. Carson: Your Honor has an admirable memory.

The Court: He was named after 280. That I am sure of.

Mr. Carson: This is a good deal like measuring time by the Ephesus of Diana. It was 287, sir. Thank you. He said, on the left-hand page, 354—I am going [15] to look at that (laughter)—it is 364; I got it in before your Honor that time—on the left-hand page, page 364, "In the exercise of equity, equitable powers, the Court has the right and it sometimes has the duty to limit its determination as to a change in decisional law to a prospective application." Then on the right-hand page, page 365, Justice Cardozo says, "There is the other doctrine, that a changed law as constituted by the new determination is thought by some philosophers to represent a Platonic view of the law as it always was."

Now your Honor had this defendant before him for many days. Your Honor's Opinion is full of expressions of commendation of its behavior in many respects, "honestly industrial, no predatory practices, no monopoly profits," and so on. In fact, at page 106 of the pamphlet Opinion, your Honor predicates the result, as I read it, on solely economic considerations. Your Honor said, "Probably few monopolies could produce a record so free from any taint of that kind of wrongdoing. The violation with which United is now charged depends not on moral considerations but on solely economic considerations."

Now to me that means that in reliance upon what Judge Hand did in the Aluminum case, in the development of the law, so lucidly explained in the Opinion, your [16] Honor is applying a changed rule, measured by economic values, to the conduct of this defendant, and since it is by economic values it is not a rule until your Honor declares it. Therefore, I think in all your determinations here is the proposi-

tion that they are prospective and not retroactive as to the measure, the quality of the defendant's conduct pre-1955. Here was ask your Honor so to declare in unmistakable terms. We do not know what other suits or what other need will arise.

We ask your Honor to declare by the amendment or modification we seek, or the construction we seek, that the Decree cannot be read both ways, as Judge Sheridan says, with respect to the crucial holding here.

I think, your Honor, I have perhaps gone farther than I needed, taking your Honor's time in traversing the field of controversy.

The Court: I know I cannot persuade you by a series of questions, Mr. Carson, but let me just see how far you really think that your argument reaches. You have flatteringly referred to the universality of this Court's Decree. Is it your view that if by mischance some misguided majority in the Supreme Court of the United States should ultimately affirm Judge Sheridan's Decree, I could still, in the face of their determination, [17] reinterpret my Decree and thus undermine them?

Mr. Carson: I would never ask your Honor to undermine even a misguided majority. But my answer is that we are here applying before judgment. There is no issue of res judicata. And if your Honor should grant the relief we seek, we should have to take it on a petition for rehearing to Judge Sheridan and thereafter it would be in the hands of that Judge, in the Third Circuit Court of Appeals and in the Supreme Court. We could not ask your Honor to act further.

The Court: If I understand it, the only universality I have is limited to action prior to the entry of the Decree by a Judge?

Mr. Carson: Yes, sir.

The Court: So that if you happened to come to me after Judge Sheridan had entered his judgment, it would be too late?

Mr. Carson: I would not say so, your Honor.

The Court: I thought you just said that.

Mr. Carson: I don't think I need to make that decision or cross that bridge. But I think that our claim would be much less strong if we came after judgment because then there would be a defense of res judicata with respect to the Hanover record. Here that does not [18] exist. The matter is still open.

The Court: Is it your opinion that very much is added by putting explicitly in a Decree the statement that the Court reserves the right to amend or make declarations or the like with respect to a Decree? Or is that not always inherent in an equitable Decree?

Mr. Carson: I understand it is inherent. But I think that the expression in Clause 23 of your Honor's Decree is an indication and a warning that the right is reserved and may be exercised at any time that is proper.

I must add that a similar reservation did occur in the Toledo Glass case, and the Third Circuit held it did not exclude their independent action. But I think I have stated the grounds that make that line of decision inapplicable here.

The Court: Well, Mr. Carson, if, as you indicate, and as, I must say, I had always supposed, my explicit statement really added nothing whatsoever to what was my inherent power, then I am moved to ask you whether you think in every equitable case, whenever it appears that some Court is likely to misconstrue the Decree, and the question comes up, either under a provision like the one in the Sherman Act, or the Clayton Act, to which you have

already referred, or comes up in [19] connection with the problem of res judicata, or in any other way in another Court, the first Court which entered the Decree which is drawn into question in the second Court can at that subsequent time reframe its words so as to make the controversy in the second Court narrower than it otherwise would be?

Mr. Carson: Certainly that we would so say with reference to treble damage suits under the Clayton Act, Section 5, which are ancillary to the main judgment. I might add that in a citation which I did not take the precaution to bring with me Judge Augustus Hand in the Second Circuit enjoined patent infringement suits in a related matter, a related matter before him, because, he said, "This Court, which sat initially in the case, can best protect the interests of everybody." I can furnish that citation. It is a partial answer to your Honor's question. You probably know it. This has been done in patent infringement cases. The United States Gypsum case, 352 United States, describes the basis of jurisdiction in that kind of situation.

So I think the answer to your Honor's question, even though it was broadly stated, is in the affirmative. I do rely on the express reservation. I think that is a warning for purposes of the Decree and its use outside [20] this District; that this Court has, in so far as it will exercise it, an interpretive power which can be exercised. I would suppose, your Honor, without undergoing the imputation of flattery, which I never like to do, that Judge Sheridan would welcome an expression from this Court on these points, if this Court has anything to add to its prior decision and Decree.

The Court: Mr. Carson, now to test this point. If by mischance, as far as I am concerned, I had died last week, is the privilege of construction a personal privilege

to the Judge who sat, or is it a privilege which inheres in the Court which rendered the Decree, so that your status to ask for this interpretation and modification would have been a life estate lapsing with my life?

Mr. Carson: I should not think it were a life estate, your Honor. I think it would inhere in the Court of original jurisdiction. But, of course, any interpretation favorable, or, I suppose, unfavorable to our application derives immense authority from the fact it comes from the author of the original Opinion.

The Court: Well, I am glad that it is a life estate ultra viv, but I don't quite understand why Judge Sheridan would pay much attention to Judge X, shall I say, [21] Morrissey, who succeeds me.

Mr. Carson: Well, here we get into the delectus personae.

The Court: I am only testing the theory.

Mr. Carson: I don't know that I could say anything about the successor Judge. But I should think that the Court which had the record, and which had exercised the jurisdiction, would have the theoretical power and control for purposes of chancery under the Clayton Act. I concede that a successor Judge who was as new to the record as Judge Sheridan initially was—in fact, he doesn't know the record yet—as new to the record as any other Judge would not have such great authority in the construction. The evidence is filed here. It is presumptively known here to all the Judges, a mere presumption. But your Honor is cognizant of the rule in the Emich case, which was a Jury antitrust case, where the Supreme Court said in interpreting for the Jury the effect of the verdict, the trial Court instructing the Jury may draw on the entire mass of the existing record in the Court of original jurisdiction. Now

that drawing on the entire mass as it were is much more easily done by the author of the Opinion. But I suppose it could be done by a successor Judge.

[22] The Court: Suppose that I, persuaded by your argument both as to my power and as to how it should be entered, did exactly what you want me to do, and Judge Sheridan, very politely, having read what I did, ignored me?

Mr. Carson: Your Honor, this is such a tempting and provocative situation that I entreat your Honor to put me in a position to bring it to pass. (Laughter) We can deal with that situation if your Honor follows our application. I cannot conceive for one moment that Judge Sheridan would decline to observe the limits of your Honor's decision. If we were not here and did not ask for this supplemental construction, I repeat that both he, and, above all, his superiors in Philadelphia, might well ask, "Why did not the defendant inquire from the Court sitting, because he reserved jurisdiction, and because the defendant was in that case with the government and was in a unique position to to do so."

The Court: I have another question. If it be the kind of doubtful issue which a distant Court might desire to receive illumination on from the local Court, why could you not ask that distant Court to proceed in the manner which, as we now know the Supreme Court encourages Federal Courts to act with regard to State [23] matters as to which the Federal Court may be uncertain as to how the State Court will decide it by getting a light in advance of a determination?

Mr. Carson: That certainly could be done, your Honor. First, of course, we have adopted a more direct and time-saving method. Second, in the example that your Honor has

given, the Supreme Court instructs the parties, as we are now doing, to remit the question to the State Court rather than addressing a communication direct to the State Court.

Therefore, I think that while that alternative might exist, it does not exclude the present alternative. I can well conceive that any Federal Judge, including perhaps your Honor, would not call formally on another Judge for an advisory opinion. That is what it would be.

I do think, however, we have an immediate and direct right to ask your Honor to rectify what we deem a great injustice.

The Court. Do you think I would look less favorably upon an advisory opinion than a corrective opinion.

Mr. Carson: I think so.

The Court: You do me great honor in believing me that humble. (Laughter)

Mr. Carson: I think your Honor would.

[24] The Court: All right. Thank you very much, Mr. Carson.

Mr. Carson: Thank you, sir.

The Court: All right.

Miss Brass: If your Honor please, I understood counsel to say that this was the first time that United had reason to think that a Judge might rule as Judge Sheridan did in the Hanover case.

I was smitten with the information which was contained in the brief that I received this morning from United, in which they said that they had been sued ten times, five times by the shoe machinery manufacturers and five times by shoe manufacturers. Two of those cases were settled and eight apparently went to trial. And yet, of these eight instances,

this is the first time United thought that a Judge might rule this way. I think the reason that this is the first time that United has sought a construction from this Court is not that at all but it is because for the first time there has been a judgment against United, which has granted damages, and it was in the process of losing the case, and all but a final Order has been entered. So for the first time United saw fit to come to this Court for a construction, because it thought that now it should seek a [25] construction which might aid it in that case and might seek to overturn Judge Sheridan's ruling.

We think this is belated, your Honor. We think that in the American Securit case, there is authority for this proposition. In that case Judge Steel made the comment, when it came to him, that he believed it was too late for American Securit at that point to be trying to secure a construction from Judge Kloeb in the Toledo Glass case, because it was nothing but a belated attempt to defeat the jurisdiction of Judge Leahy, who had already ruled upon the matter in the Delaware Court.

We believe that situation is analogous to this. As a matter of fact, your Honor, when it came up before the Circuit Court of Appeals in the Third Circuit, that Court was not very polite in what it said in its Opinion, because it ruled that Judge Steel had been correct when he had issued an injunction to American Securit to prohibit American Securit from going to Judge Kloeb with this issue.

So I would say in that case that this is contrary to Mr. Carson's argument. As a matter of fact, Judge Kloeb even recognized in his oral Opinion that there was jurisdiction in the Delaware Court.

[26] Now in this situation which is here before your Honor, this Hanover case has been in litigation for, I be-

lieve, ten years and during that entire time United had not seen fit to come before this Court until it found it had lost the case. We think this is a belated effort here. We don't think this Court should entertain this matter at all.

As we said in our little memorandum we filed with the Court, if United has been aggrieved by Judge Sheridan's Opinion, the appropriate legal remedy is available to it. It can appeal to the Third Circuit and, I am quite sure, it probably will. But to come before this Court at this time, when it never before sought construction of the Decree, we think is inappropriate, and we submit that the Court should not entertain this application.

That is all I intend to argue about it, your Honor.

The Court: Miss Brass, I have some questions to put to you. First of all, I want to say I am always glad to see you personally here and I am also glad to have the Department of Justice here more particularly since this is a case in which the United States is very definitely a party to the original proceedings and [27] obviously concerned about any matter of a possible modification of a Decree.

Miss Brass: Yes, your Honor.

The Court: But, I take it for granted, that the Department of Justice remains true to what it describes on the walls of its buildings with respect to its interest in having justice done as distinguished from merely prevailing. And I suppose you have no more doubt than Mr. Carson has as to what was my intention when I entered the Decree. Have you any doubt?

Miss Brass: We have no doubt, your Honor, at all.

The Court: Have you thought it fit to tell Judge Sheridan that you have no more doubt than Mr. Carson about what the whole nature of the proceeding was?

Miss Brass: Your Honor, until we received this application a few days ago, we had no reason to assume that this issue was even going to arise. We had no notice whatsoever that this was going to be filed before your Honor. There has been no occasion for us to appear before Judge Sheridan.

The Court: But don't you think Judge Sheridan might wrongly misconstrue your appearance here by [28] assuming that you thought that Mr. Carson was mistaken on his ultimate point as to how I looked at the matter when I decided it?

Miss Brass: Well, your Honor, I am not here this morning to argue the merits on the matter and I don't intend to. I merely came to point out to your Honor that we do not think this is an appropriate proceeding. We do not think your Honor should entertain it.

As a matter of fact, I am here to represent our interest, of course, as we always do have an interest in our judgments, but we do not feel that your Honor's judicial time should be taken up to duplicate what Judge Sheridan has already done in the Hanover case.

The Court: You have chosen to come here. I did not invite you. I am glad to see you.

Now that you are here, are you not aware from being here on previous occasions that the government never contended, and I never ruled, as Judge Sheridan supposes the matter was decided? Are you not aware of that?

Miss Brass: Well, your Honor——

The Court: I ask you as lawyer, on your honor as a lawyer.

Miss Brass: Your Honor, I do not read the [29] Court's decision as being different or being opposed to what Judge Sheridan has ruled.

The Court: Is that your testimony as a lawyer, Miss Brass?

Miss Brass: Your Honor——

The Court: Is that your testimony as a lawyer, that you would like to stand on before me, as being your best legal opinion?

Miss Brass: Well, your Honor——

The Court: I am just asking you, and I will hold it as a statement of your character as well as your competence.

Miss Brass: Your Honor, I can only say that I have read the decision as meaning that your Honor has found a violation of law covering the period of time which was charged in the Complaint. It had not occurred to me until I received these papers from United that it was in any way not what your Honor had done. I am not here today to argue the merits of the matter. I was instructed merely to make the point to your Honor, that this should not be entertained. I am not in a position to discuss the merits and I have not been instructed to discuss the merits, your Honor, and I would not be able to say what the official Department's view of this would [30] be under these circumstances.

The Court: I did not ask you that. Miss Brass, I will just say to you two things, which you may deem irrelevant. I commend Mr. Justice Brandeis' remarks made when he was Mr. Brandeis about Louis R. Gladys and his duty as an employee of the government, and with no humility I suggest you look at the letter I wrote about Miss Frances Perkins in The New York Times last week as to what constitutes high public service.

I am sorry that in response to my question to you as an individual as to what your view, based on your character and competence, was you so evaded my question. That is all I care to say.

Miss Brass: Your Honor, I do not feel that I have evaded your question. As I said, it never occurred to me until I received these papers the other day that there could be this interpretation of your Honor's decision. I have read it and I can see things in it which perhaps could be used by United to support its position. I have noticed other things in the decision which would support the other view. So I did not evade your Honor's question. I assumed and have always assumed that your Honor had ruled that there had been a violation for the entire period covered in the Complaint, and I [31] could, your Honor, point out in the decision portions thereof which, I think, would support that. That is the best answer I can give, your Honor.

The Court: No one who knows me will misunderstand the nature of my questions and comments even if on the jurisdictional ground I find it inappropriate to give the relief asked.

Miss Brass: Your Honor will recall perhaps that I was not here throughout the trial of this case. I perhaps am not as familiar with the record as——

The Court: Oh, Miss Brass, you were here frequently and are now handling a matter in connection with the reopening sought by the government of the Decree. Pleas of ignorance, like the other pleas you have made, go to the question of your character.

Miss Brass: Your Honor, I do not feel that my character is involved in this. I have given you a truthful answer, in so far as I can, of my interpretation of your Honor's Decree and your Honor's Opinion, which I have examined, and, as I say, I can see arguments that could be made either way from the decision itself as to what your Honor had in mind.

The Court: Does any amicus curiae wish to be heard?

[32] Mr. McAllister: Your Honor, very briefly.

The Court: I am glad to see you.

Mr. McAllister: I am here on behalf of the Hanover Shoe Company, which has been described here already. We appear really to question the propriety of this procedure. This is not an attempt, as we see it, to ask your Honor to construe or interpret or modify the final Decree that was entered here. There is no ambiguity about the language.

The defendant, it seems to me very obviously, is attempting to ask this Court to reach back and re-do its earlier opinion on the substance of the Opinion as to the violations and not as to the remedy that was found to be appropriate here.

I had promised myself that I would not get into the merits as to Judge Sheridan because I think it is entirely appropriate and suitable that this should be heard before the Court designated to hear it. It is interesting to get a preview of the argument that will be presented there. That is always very helpful, I am sure. But, frankly, your Honor, I am not going to enter into the merits of that.

We, of course, believe that Judge Sheridan treated the decision of this Court correctly in his case, [33] which was a treble damage case. We will so contend, of course, before the Third Circuit. We think it is very clear that Judge Sheridan proceeded with the utmost care. He took almost two years to render his Opinion. And I really think that when your Honor studies it, you will be struck by that.

But I am here, as I say, really to say that this is not a proper procedure, and is not an attempt to interpret the final Decree. That has been lived with very satisfactorily, I am sure, by the defendant, perhaps unhappily but satisfactorily. They are not asking for construction of language.

There seems to be no problem of enforcement of the Decree, of any of the usual considerations that would enter into an application of this sort. This is quite different. And I think it is perfectly obvious that it is different, and I shall not belabor the point.

Any error, if such there be, and we think there was none, will be before the Third Circuit in due course, your Honor. We ask that the application of the defendant should not be entertained and should be dismissed.

Thank you, your Honor.

The Court: Thank you, Mr. McAllister. Does anybody else wish to be heard? Mr. Trustman.

[34] Mr. Trustman: Your Honor, as long as we are in the courtroom, I think I should say that Mr. Hally and I are here as observers. We have considered between ourselves whether it would be appropriate for us to make a statement in connection with this application. We have also discussed the matter with counsel, who is in Washington, for the National Association. We appear only for the New England Association.

We have concluded on behalf of both Associations that it would not be appropriate for us to make a statement and take a position on this matter.

The Court: Is there anything else that anybody else wants to say?

Mr. Carson: Your Honor, could you just give me another minute?

The Court: Yes.

Mr. Carson: One of my opponents says that your Honor's Decree could be partly read one way and partly the other way. The other opponent says there is no ambiguity. It is your Honor's view we solicit.

The second point is—if your Honor cares to hear why the Hanover case took ten years to get up to this point—it is perhaps a sad history of judicial administration that after the suit was brought in the [35] Middle District the question of the passing on defense was presented to Judge Murphy for a preliminary trial under the appropriate rule by consent of the parties, and that took two and a half years, at which time Judge Murphy, not having decided the point, the Chief Judge appointed Judge Goodrich as a District Judge to hear and decide the point, which he did promptly, and an appeal was taken which was unsuccessful for the defendant.

And then Judge Murphy having died, and Judge Goodrich having died, the Chief Judge assigned the case to Judge Steel in Delaware, who then took the proceedings for about a year and made a few rulings, but then fell ill, and the term of his illness was so uncertain that the Chief Judge advised both parties that the case was available for reassignment to another Judge and he did then assign it to Judge Sheridan, who, after preliminary proceedings and the trial of twelve days, took two years after the last oral argument to render the Opinion filed April 28th.

Now in all that time we could not have had a reasonable expectation that a Court would come to a conclusion different from that of Judge Burke which, as I say, we tendered to Judge Sheridan, and whose decision is not even mentioned as such in the Judge's Opinion.

[36] Now my third point. I would like merely to note it in the record. Of course, your Honor knows it. Your Honor mentioned it—your jurisdiction. Jurisdiction is abundantly established, it seems to us, not only by the Columbia Artists' case, cited in our brief, but by the basic case, United States Gypsum, 352 U. S. 457, at page 464. The

majority in a divided Court said, "We think that whether Gypsum was barred from recovery, etc., was a problem sufficiently related to the rationale of the 1951 Decree to bring it within the reserve jurisdiction clause. This is especially so because patent misuse was the essence of the old antitrust litigation and its continuance or renewal were thus issues peculiarly within the province of the antitrust clause whose determination would avoid multiple litigation and possibly conflicting decisions on that issue among the Courts in which Gypsum had brought suit."

That, of course, was again a patent controversy. I merely mention again that our case is the stronger when the jurisdiction exercised is that which Congress has given by the Clayton Act certain superior authority and force.

The Court: Since you rose the second time, Mr. Carson, and called to my attention the delays which have occurred—I had thought of reserving my decision—[37] but I think there would be no use, except from the point of a perhaps more elegant expression of my views, for me to delay.

I deny the application made by United Shoe Machinery Corporation. But I deem it appropriate expressly to call attention to the full range of the colloquy which preceded my ruling as well as briefly to summarize what seemed to me to be the determinative considerations.

I shall not address myself to the technical question as to whether by virtue of the terms of the Decree or indeed by virtue of the inherent powers of an Equity Court I do have jurisdiction, and in that sense power, to grant the relief which has been requested.

It seems to me sufficient for me to say that, if I do have the power, in this particular case I, as a matter of discretion, would not exercise it.

In the first place, this application comes rather late with respect to the particular Hanover Shoe Company litigation and also with respect to other litigation raising many of the same questions. I am not sure whether it would have been desirable for the parties before another District Court to have suggested that the parties might have applied to me for a [38] construction of my Decree but in any event no such proceding was begun. Now the situation is one in which an able and respected United States District Court Judge has written an Opinion; and, although he has not yet entered a judgment, the Opinion bears on its face full evidence of the careful consideration which he gave to the points now brought to my attention. I have that regard for Judge Sheridan personally and for the Court on which he sits to be loath to intervene at this stage in a way that at any rate the general public would assume to be a kind of review of his action, and indeed, if I decided as I am asked to decide, an undercutting of his position. There are available remedies by way of appeal certainly to the Court of Appeals for the Third Circuit; and if by any chance that Court should affirm the Decree of the District Court, this would appear to be the kind of case in which the Supreme Court of the United States might well indulge its power to grant a petition for certiorari.

There are very grave difficulties in the method of proceeding which I am asked to follow in the application before me. Already I have pointed out that although the application obviously hopes to elicit my personal recollection and understanding and intention, the application, if [39] sound, would seem also to lie even were I no longer a sitting Judge, and the relief sought were asked from this Court then being presided over by a successor Judge whose sources

of information and capacity might well not equal those of the distinguished District Judge who has already heard the Hanover Shoe case.

I regret that the Department of Justice through its representative called upon in this situation to be recorded as other than present. Naturally the Department of Justice and the government are interested in a Decree in which the United States is a party but I cannot understand how any person who was familiar with the whole course of this litigation could have any doubt whatsoever as to what had been my view of the conduct of the defendant, of the degree to which it had violated the Act and the degree to which the Decree was addressed beyond eliminating violations to setting forth a program of future conduct which would make it hereafter less likely that the violations could continue.

The sought for relief is denied on the ground that the Court in its discretion determines not to exercise any power it might have, if it has any.

Annex 1 to Affidavit of Ralph M. Carson

[40] **Certificate**

I, Charles T. Duffey, official reporter, United States District Court, do hereby certify that the foregoing transcript, pages 1 through 39, inclusive, constitutes to the best of my knowledge, skill and ability a true and accurate transcription of my shorthand notes taken in the above-entitled case.

CHARLES DUFFEY

Annex 2 to Affidavit of Ralph M. Carson

Dean Edward S. Mason's article in a recent number of the Harvard Law Review which raises many very difficult problems in connection with this case.

I also have observed certain of his remarks in Chapter 1 on Profit, especially Part 3 thereof, and his remarks in Chapter 7 on Basic Pricing, and Chapter 8 on Product Line Pricing, and Chapter 9 on Price Differentiation.

I would anticipate no better use could be made by the Government and by the corporation of its time in the next week than to read very carefully the documents of which he is the author and to which he had previously subscribed, and I call to your attention also the fact that he was a co-editor of the American Economic Associates readings in the social control of business and that his knowledge was extensive obviously, in certain aspects of the shoe industry as well as machinery industry, and extends at least into the related field, from a machine point of view, certain aspects of the textile industry. He is the author of a study involving hosiery machines in 1941 published by the University of Chicago and I am very anxious that he be amply tested in connection with what seemed to be three of the outstanding divisions of this case, what seemed to me the big divisions.

First, if I may point out, obviously the answer to one may make it unnecessary to answer the second and the answer to one and two may make it unnecessary to answer the third.

The first question in the case is, is there a prohibitive monopoly? I intend to include within that, is there a prohibitive intent to monopolize, even if monopoly hasn't been achieved?

The second main division, it seems to me is, if the answer to one is in the affirmative, how was that monopoly

achieved? And assuming that the answer to Question No. 1 is in the affirmative, the third division would be, what should a Court do in order to eliminate the monopoly and restore competitive conditions?

The economist who is to testify is obviously expert in many of the problems that are presented in those three divisions. Whether he is called to testify broadly or whether he is called to testify narrowly, I think he had better be prepared for a rather wide range of questions, in particular in regard to Division No. 1, one of the economic questions which I think needs to be analyzed is, what is the field with which an economist would say we are here dealing? Is it appropriate, from an economist's point of view, to treat each machine type as involving a separate field? Is it appropriate to group machines together? Is it appropriate to regard as the field the whole field of shoe machinery or may there be, from an economic point of view, limitations upon that so as to exclude, for example, the type of machines used in the upper fitting room or the type of machines used in the cement process.

I am not trying to answer the question; I am trying to say that it is an economic as well as a legal question as to what is the field in which it is claimed that one determines whether there is or is not a monopoly.

Then, related to this first division is the problem of what is, in an economic sense, a monopoly. Is it true, from an economist's point of view, that a share of the market, no matter how large, is itself the proof of a monopoly? Or, on the contrary, is a share of the market a mere indicium or piece of evidence which, together with other evidence, is used to determine whether there is what an economist would call a monopoly which I assume, though

I cannot not to assume it to be the power to control price and production.

In connection with the power to control price and production, I would like to know what an economist understands that really means, tested against particular instances in this case.

I pass over many other difficult questions which seem to me to be legal in character rather than economic in character and I deliberately avoid the difficult problems which are presented by a lawful monopoly existing as the result of a patent grant.

It may be that an economist is competent to testify as to the effect of an aggregate of patents; I do not say he is or he is not. I will wait and see until the questions are put.

Going now to the second large division of the subject, if one assumes that a monopoly is found, and nothing that I have said previously or say today is meant to indicate that I have a view as yet as to whether or not a prohibitive monopoly exists in this case, then we would come to the question as to how that position of dominance was achieved.

It seems to me everybody will agree that some of the elements were of one character and some of another; that, for example, the dominance of the company is to some extent undoubtedly attributable to practices which have previously been considered and approved by the Supreme Court of the United States.

There can be no question that the dominance of the company is a result of practices it has followed for a long period of time. I am not saying that is the only one and I am not saying that the fact the Supreme Court has previously approved those practices means that the present Supreme Court would take the same attitude or that this

Court is bound to follow the decisions of the Supreme Court at earlier stages. I am merely stating what seems to me a plain fact, that some of the causes of the company's eminence are in practices which have been approved.

Thus, for example, the consolidation of the various constituent companies is unquestionably one of the causes of the company's present position. It is equally clear in United States v. Winslow that problem was considered by the Supreme Court of the United States and as then constituted that Court accepted the opinion of Mr. Justice Holmes that that conduct was permissible under the anti-trust laws as then construed.

It is equally clear some of the eminence of the company is due to its business ability, its skill, its research—and its efficiency, though I am not saying how much efficiency or how little—but those are elements which obviously did contribute to the company's position.

Likewise, it is clear that some of the company's position is due to patents. I think the company would be the first to say that in the earlier years it had a larger number of patents which could be described as basic and now it has a larger number of patents which deal with more limited improvements.

The company would say that was to be anticipated in the light of a crowded art developing over a number of years.

No doubt the patent explanation is an explanation of part of the growth of the company; whether it is an explanation of its present position in the sense that it is an explanation of its day to day achievements might be more doubtful. I am not expressing an opinion.

The company might say that that was not important, and the company might rely upon the testimony which was

given by one of the Compo executives to the effect that he thought that patents did not stand in the way of any competitor's approaching by a different avenue the same result. I am referring to testimony given by Mr. Smith.

Or the company may take the position that the patents, while of some importance, are of nothing like the importance which the Government has occasionally said that they were, from the point of view of defensive, offensive and other competitive considerations which, in the Government's view, go beyond the original intended purpose of the patent grant.

Now, everything that I have so far referred to may be thought to involve questions more legal in character than economic in character. And I am not sure how far it is appropriate to put questions along these lines to Mr. Dean or any other expert. I have mentioned these considerations so that you would realize that I know, or I think I know, that the eminence of the company is attributable to many factors, some of which clearly are supported by some, if not all, cases in the Supreme Court.

To some extent, however, the company's position must be a result of its practices in connection with merchandising. To some extent, its position must be the result of leases, and of the particular types of leases here involved, these leases having special clauses which have attracted the specific attention of the Government in its pleadings, and in its prayers for relief. The leases also have in them, or have implied as annexes to them, rights to receive service, as well as rights to have the use of the machines, and this bundle or combination has been much discussed in the testimony.

I am not unmindful of the fact that these leases as they now stand seem to have been supported by a decision of

the Supreme Court of the United States in the cases which were before it on previous occasions. And nothing that I say is intended to deal with the legal contention that this Court is bound to follow, either as a matter of the law of the case, or as a matter of res adjudicata, or as a matter of precedent, the earlier determinations of the Supreme Court. Those problems would have to be dealt with in the legal argument.

But I am now considering the case as it lies, or will lie when an economist is on the stand. And I think it would be important for me to know to what extent the economist traces the present position of United to the form of the lease. How far does the economist think that specific provisions in the lease are contributory to United's present position? How far does the economist think the bundle is contributory to United's present position? How far does the economist think that these practices are practices which would more or less be inevitable in any event in an industry with the characteristics of the shoe machinery industry? How far does the fact that Compo has the same pattern indicate that the leasing pattern is a consequence of the industry? How far is it a question of Compo apparently following a leader? How far is it an unusual situation which can be explained only by a desire for market dominance?

I am not trying to answer these questions. I am trying to show what goes through my mind as to the value that an economist may have in dealing with this type of problem.

In addition to the general question of the form of the leases, problems have been raised about the terms of the leases. That is to say, the terms set for one machine have been contrasted with the terms set for another machine. When Professor Meriam of Harvard was on the stand,

he pointed out that corporations in many lines of business follow the habit of realizing different rates of profit from different types of products made by that corporation or those corporations.

As I understand the Government's view, it is that here the differences are so extreme as to the rates of profit and the surrounding circumstances are so plain that the Court ought to find that United has not followed a merely normal market practice but has disclosed a motive to monopolize. If the Government does so contend, there must be specific examples on which an economist who has shown familiarity with the literature of the subject on such a scale as Professor Dean has shown it, could help us.

There are other problems with respect to the affiliates of United, and here I am going to be very slow to indicate by specification the problems which arise. But it is quite plain that an argument could be addressed to me that all the affiliates do not stand on the same footing. There may be economic considerations with respect to one group of affiliates, and one type of product, different from other products. It may be that the degree to which an affiliate has already a control or a tendency to control a supply may be important, or it may not be so.

It may be that a quite opposite argument from the one that I have just been considering might be addressed to me. Perhaps it would be said that any company which had acquired so important a position as United has necessarily in every extension of its power into any field an advantage which the anti-trust laws would not permit. Something might be said about the gravitational pull of the central mass.

But that is an economic question quite as much as a legal question. Or at least, the economic question enters

into the legal question. And here again, it seems to me that a man of Professor Dean's eminence and experience could help.

Now I pass to the third main division of the case, as I see it, and that is, suppose—and nothing more than suppose—that the Court should find that there was a monopoly prohibited by the anti-trust laws, and suppose it should trace the growth of the monopoly to attribute something to the leases, something to affiliates, something to other practices, and should also attribute some of the growth to perfectly proper conduct, like efficiency, like research, like inventiveness, like progressiveness in the industry.

Suppose further that the Court should attribute some of the growth to practices specifically considered by the Supreme Court of the United States and concretely approved by it. I mean such questions as the original combination of the constituent companies.

The very difficult problem will arise of what the Court ought to do to bring about a competitive situation. First of all, I would want to know what in the view of an economist would be a competitive situation. I don't mean to have him decide my case, but these questions are questions on which a judge can be helped by expert testimony.

How far would the rooting out of a particular clause in the lease go to accomplish the aim? How detrimental would the rooting out of that clause be to the industry as a whole? And by the industry as a whole here, I mean to embrace the shoe machinery industry, the shoe manufacturing industry, and the wearers of shoes. What would be the economic consequences of creating a segregation in leases, so that the lessee had the option either to lease the machine free of service, or if the company chose to give it, to lease the ma-

chine with service? What would be the consequence of a situation in which the company was required to offer for sale every machine, but at its option the company was free to propose a lease upon economically equivalent terms?

What would be the effect upon the industry if orders were to be issued by this Court with respect to affiliates, subsidiaries, and those parts of the main enterprise of United which were not directly concerned with the manufacture of machines? What would be the effect on the competitive situation? What would be the effect on the efficiency of the industry as a whole, meaning the shoe machinery industry, the shoe manufacturing industry, and the ultimate consumer?

Now, I also ought to say, what would be the effect if the patents were to be subjected to licensing either on a royalty basis or free of royalties? How would it reduce, if at all, the monopoly position, if it exists, of United? How would it operate in connection with the industry as a whole?

Now, I need hardly say that I realize the program I have sketched is one that cannot be accomplished in a two hour examination. And somebody will tell me not in a two day examination. But I do believe that these issues are economic as well as legal issues in large part, and that an economist who has the training and background and authorship of Professor Dean is obviously peculiarly qualified. I don't suggest he is the best qualified.

Mr. Hall: I agree with everything you have said about Professor Dean. I wish you had been with us when we endeavored to persuade him to testify. In the first place, he did not want to testify, on account of his duties in Columbia University, but more especially on account of the health of his wife. And he said that he couldn't give an opinion

or make an investigation along all of the lines that your Honor has indicated.

I realize, of course, the experience that he has had, the books that he has written, and I can't prevent questions from your Honor or from the Government, but I want you to have this in mind, that he has chosen one branch of what I call the

Supplemental and Amended Findings of Fact, Conclusions of Law and Opinion, as Amended

Hanover submitted a recomputation of damages. United filed a response not only to the recomputation, but also to the bases for the damage calculations. Hanover filed a reply.

In reality, Hanover submitted two and one-half sets of calculations based substantially on the method described in part E. 1. Two sets of calculations consist of a computation for the 20 major machine types and a separate computation for the 37 lesser machine types. The third calculation, based on Hanover's historical lives, is a computation for only the 20 major machine types. The damages for the 37 lesser machine types to go with this half set were computed by first deriving the ratio of rents and royalties paid on 37 lesser machine types to the rents and royalties paid on the 20 major machine types. This ratio was then applied to the excess of computed net costs of leasing over computed net costs of ownership for the 20 major machine types, Hanover historical lives.

This method was clearly set forth in Hanover's final brief and proposed findings of fact and conclusions of law. United limited itself to a general attack on the calculations, and to items improperly included or excluded. This court adopted the average of three separate sets of damage calculations as reasonable, which included the one-half set for the 37 lesser machine types based on Hanover historical lives.

United now attacks the mechanics of the computation for the 37 lesser machine types and suggests another basis; that is, ascertain the ratio of Hanover's claim for the 20 major machine types on the Hanover historical life set basis to Hanover's total claim for the same machine types on the two other bases, and then apply this ratio to the total

claimed damages for the 37 lesser machine types on the other two sets which Hanover put in evidence, that is the Joel Dean lives and 15-year lives. In its reply Hanover did not comment on the merits of United's method but argued it was belated and that the court's figure should be retained as the starting point. If United's contention depended on the reception or consideration of additional evidence, this court would disregard its argument. In damage calculations of this type, however, the question is one of the reasonableness of the approach, in terms of relevant, informative and logically significant data, which can be determined from matters of record. Both the Hanover and United methods meet these criteria. United's method further refines the calculations and is the better one. Accordingly, the court accepts $1,812,965[16] in lieu of $1,830,640, as the starting point for the recomputation.

Damages for 20 major machine types, Joel Dean lives (P-42 as amended by exhibits P-123 and P-50)	$1,630,239.86
plus	
Damages for 20 major machine types, 15-year lives (P-37 as amended by exhibits P-123 and P-50)	1,607,922.25
=	$3,238,162.11
Damages for 20 major machine types, Hanover historical lives (P-41 as amended by exhibits P-123 and P-50 and other service cost adjustment)	$1,577,189.25
or a ratio of	.487

[16]Rounded to nearest dollar.

This ratio is then applied to the total damages for 37 lesser machine types, Joel Dean lives, and 37 lesser machine types, 15-year lives, to arrive at damages for 37 lesser machine types, Hanover historical lives, as follows:

Damages for 37 lesser machine types, Joel Dean lives (P-46 as amended by exhibit P-123 and adjustments for service costs)[17]	$205,821.04
Damages for 37 lesser machine types, 15-year lives (P-43 as amended by exhibit P-123 and adjustments for service costs)[17]	213,509.52
	$419,330.56
	x .487
	$204,213.98

The total damages for all machine types, Hanover historical lives, is thus:

$1,577,189.25
204,213.98
$1,781,403.23

[17]The adjustments for service costs on the 37 lesser machine types are determined as follows:

Amended rental and royalty charges (P-46)	$ 348,026.52	
Amended rental and royalty charges (P-42)	$2,133,777.05	= .1631
Amended service costs for 20 major machine types (P-50)	$ 101,803.04	
	x .1631	
Amended service costs for 37 lesser machine types	$ 16,604.08	

The $16,604.08, together with applicable adjustments shown on P-123 are deducted from rental and royalty charges as shown in P-46 and P-43 to arrive at a new computed net cost of leasing from which is deducted the computed net costs of ownership as shown in P-46 and P-43 to arrive at the damage figure.

The average of all the damage calculations is:

P-42 and P-46 as amended	$1,836,060.90	
P-37 and P-43 as amended	1,821,431.77	
As computed above	1,781,403.23	
	3/5,438,895.90	= $1,812,965.30

The damage calculations include no claim with respect to the Sole Leather Dieing Out machine type and, therefore, the exclusion from damages for this machine during the period 1941-1955 is not necessary. For the remaining machines for which damages were ordered excluded, the following table shows the average amounts excludable from damages for the respective machine types.

Machine	Leidesdorf No.	Period	Amount to be Excluded from Damage (averages)
Outsole Rapid Lockstitch Machine	1	1939-1955	$324,356
Upper Leather Clicking Machine	12 and 50	1950-1955	3,128
Sole Laying Machine	27	1951-1955	3,019
		Total	$330,503

The interest to be included in the damage calculations is $69,259.

Summary of Damages:

Average of all damage calculations		$1,812,965
Less damages for:		
Outsole Rapid Lockstitch Machine	$324,356	
Upper Leather Clicking Machine	3,128	
Sole Laying Machine	3,019	
		330,503
Net average damages—all machines		$1,482,462
Less interest		69,259
Total damages—to be trebled		$1,413,203

In addition to matters related to the recomputation of damages, United and Hanover set forth several arguments, all of which were previously advanced and fully considered by the court. They will not be reconsidered.

Application for Attorneys' Fees

Hanover was represented by the law firm of Donovan Leisure Newton & Irvine (Donovan), New York, New York, chief counsel, and Nogi, O'Malley & Harris (Nogi), Scranton, Pennsylvania. The recomputed damages of $1,413,203, when trebled, will result in a final judgment of $4,239,609. Donovan seeks a fee of 20 percent of the

damages recovered, or $847,992, together with $4,381.87 in reimbursement of necessary travel expenses, and Nogi seeks a fee of 3 percent of the damages recovered, or $127,188.

United concedes the standing of counsel, the magnitude and complexity of the litigation, the responsibility undertaken by Hanover's attorneys, the number of hours expended by counsel, the description of the proceedings, and the disbursements for travel. United contends that the requested fees are grossly excessive and not supported by enough evidence for the court to exercise its discretion. United points to the absence of evidence of the customary worth of counsel engaged, the necessity for the participation of eight lawyers, and the going rate for leading trial counsel in the Middle District of Pennsylvania.

The fixing of attorney's fees is within the discretion of the trial court, reasonably exercised. Some of the factors considered are: (1) whether plaintiff's counsel had the benefit of a prior judgment or decree in a case brought by the Government, (2) the standing of counsel at the bar—both counsel receiving the award and opposing counsel, (3) time and labor spent, (4) magnitude and complexity of the litigation, (5) responsibility undertaken, (6) the amount recovered, (7) the knowledge the court has of the conferences, arguments that were presented and of work shown by the record to have been done by attorneys for the plaintiff prior to trial, (8) what it would be reasonable for counsel to charge a victorious plaintiff. Noerr Motor Freight, Inc. v. Eastern R. R. Pres. Conf., E. D. Pa. 1958 166 F. Supp. 163, *aff'd,* 3 Cir. 1959, 273 F. 2d 218, *rev'd on other grounds,* 1961, 365 U. S. 127.

This case was one of great magnitude and complexity. There was a separate four-day trial of the passing-on issue. Hanover prevailed in the district court and in the court of appeals and certiorari was refused by the Supreme Court. Counsel, in the preparation of its case, and in meeting the highly competent and skilled defense of United, was required to prepare numerous briefs and legal memoranda on issues which were novel or which had not been authoritatively settled. The theory of damages was necessarily complex in view of the monopoly and the need for Hanover to meet the standards necessary for an acceptable damage calculation. To accomplish this, counsel had to collect, through numerous requests for admissions, depositions and interrogations, detailed factual data in support of its claim and reply to the defenses. This was a particularly big job in view of the number of machines involved and the period of time—sixteen years—of the damage period of this action. Some of the interrogatories were met with objection with a consequent need for argument and decision. United also availed itself of discovery which in some cases met with objections from Hanover. Fifteen days were spent in taking depositions at various places throughout the country. Much of this data was assembled with the help of certified public accountants and others with whom numerous conferences were necessary. There were several pretrial conferences. The trial lasted 19 days. The record consists of 2,553 pages, exclusive of the closing arguments. Hanover offered 124 exhibits. Many of these were voluminous and without question their preparation required extensive work. United offered 87 exhibits. Counsel for Hanover submitted extensive briefs, reply briefs and proposed findings of fact and conclusions of law.

The proceedings attest to the great responsibility undertaken by counsel. The amount recovered is substantial. Subsequent to the decision in this case and while damages were being recomputed, counsel appeared before the United States District Court for the District of Massachusetts to argue against a belated application for reconstruction of the Government decree, and then appeared before this court to argue against an application for a rehearing based upon the colloquy that transpired in that court. Counsel on both sides have pointed to the uniqueness of many features of this case. In view of these matters, "customary charges" and "going rates," presumably for ordinary litigation, would be of little weight in determining the amount of compensation to be awarded.

The greater part of this effort and time was expended by Donovan. It is conceded that Nogi, whose participation and responsibility was on a lesser scale, actively participated in many aspects of the litigation. It aided in pretrial preparation; participated in numerous pretrial and trial conferences, reviewed pleadings, briefs, and memoranda; participated in all court sessions, and was on the briefs in the appeal of the decision related to the passing-on issue. Total time devoted to this case, all by a senior partner, was 950 hours.

In view of these matters this court finds that attorneys fees of $600,000 to Donovan and $50,000 to Nogi are reasonable. The cases have devised various standards for testing the reasonableness of the fees awarded in terms of percentages and rates per hour.

The fee to Donovan amounts to about 42.5 percent of simple damages and less than 15 percent of the treble damages. These percentages are in line with fees awarded in

recent antitrust cases.[18] At United's insistence Donovan produced its fee arrangement with Hanover. Under this,

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[18]In note 3 of Bal Theatre Corp. v. Paramount Film Distr. Corp., N. D. Calif. 1962, 206 F. Supp. 708, there are collected a number of cases, to which this court has added, which show the following:

Case	Damages (trebled)	Fee Award	Percent
Twentieth Cent. Fox Film v. Goldwyn, 9 Cir. 1964, 328 F. 2d 190	$ 300,000	$100,000	33.33
Union Carbide and Carbon Corp. v. Nisley, 10 Cir. 1962, 300 F. 2d 561, 587; reversed trial court on issue of damages, but approved 15% of amount recovered as attorneys fees	$4,400,000	$500,000	11.36
Sunkist Growers Inc., v. Winckler & Smith Citrus Prod. Co., 9 Cir. 1960, 284 F. 2d 1, 4; reversed on other grounds, 1962, 370 U. S. 19	$1,447,500	$195,000	13.47
Darden v. Besser, 6 Cir. 1958, 257 F. 2d 285, 286; attorney's fee increased from $10,000 to $30,000 by Court of Appeals	$ 135,000	$ 30,000	22.22
Clapper v. Original Tractor Cab Co., 7 Cir. 1959, 270 F. 2d 616, 626	$ 82,824.05	$ 25,000	30.18
Twentieth Century-Fox Film Corp. v. Brookside Th. Corp., 8 Cir. 1952, 194 F. 2d 846, 858; the Court of Appeals reduced the attorney's fee from $150,000 to $100,000	$1,025,000	$100,000	9.76
Milwaukee Towne Corp. v. Loews, Inc., 7 Cir. 1951, 190 F. 2d 561, 569; the Court of Appeals reduced the attorney's fee from $225,000 to $75,000 and also reduced the award of treble damages from $1,295,878.26 to $941,574.30	$ 941,574.30	$ 75,000	7.97

counsel was to receive 20 percent of the recovery, whether by trial or settlement. United points to the lack of evidence to show the need for the number of lawyers who were engaged in this case, and consequently, the hours spent. Since this court has arrived at the fee award on bases other than the number of hours, the lack of such evidence is not significant. Counsel have submitted figures, which are not disputed, which show that partner hours totalled 4,849 and associate hours totalled 6,574, for a grand total of 11,423 hours. If we assume that associate time is worth half as much as partner time, then the fee awarded would reflect a partner rate per hour of about $74.00 and an associate rate per hour of about $37.00.[19]

Due to Nogi's limited participation the percentage of fee to the total award is not meaningful.[20] Rule 3 of the rules of this district provides that non-resident attorneys, such as Donovan, shall have associate counsel from this

Case	Damages (trebled)	Fee Award	Percent
American Can Co. v. Bruce's Juices, 5 Cir. 1951, 187 F. 2d 919, 920	$ 180,000	$ 35,000	19.44
Noerr Motor Freight v. Eastern Railroad Pres. Conf., E. D. Pa. 1958, 166 F. Supp. 163, 168	$ 652,074	$200,000	30.67

[19]The fee arrangement between counsel and Hanover provided that as a minimum counsel be paid $25 per hour. This rate is not significant here because (1) in view of the percentage arrangement, it looks primarily to an unsuccessful prosecution and (2) it was agreed to in 1955 when economic conditions differed and when counsel, no doubt, could not foresee the extent of this litigation.

[20]The fee awarded is slightly more than 1 percent of the trebled damages.

district. Among other things, this enables the court more easily to communicate with counsel and to have before it counsel who, as members of the bar of this court, are responsible to it. The Nogi firm, for the most part, had one man, senior partner Russell J. O'Malley, Esq., engaged in this litigation. The need for at least one man can hardly be questioned. In view of the complexity of this litigation, it is understandable that Donovan would choose counsel of experience and high standing. On the basis of the 950 hours devoted to this cause, Mr. O'Malley and his firm would be compensated at little more than $50.00 per hour. This is reasonable not only in view of Mr. O'Malley's participation in this case, but also because his representation prevented him from being productively engaged in his own practice.[21]

In support of the application for disbursements for necessary travel expenses, Donovan relies on Judge Wyzanski's opinion in Union Leader Corp. v. Newspapers of New England, Inc., D. Mass. 1963, 218 F. Supp. 487. In that case the court, in determining what would be a reasonable attorney's fee, took into account the number of hours which would have been necessary to prove the claim, and necessary disbursements, including disbursements for accountants, of about $8,000, as relevant but not exclusive guides. The court did not allow the disbursements as a separate item

[21] While Donovan's fee arrangement with Hanover originally provided that Donovan would take care of the cost of local counsel if there were to be a recovery, this originally contemplated that local counsel from Hanover, Pa. would be engaged. Subsequently, it was determined that local counsel from Scranton, Pa., the situs of most of the proceedings, would be necessary. Accordingly, this part of the fee arrangement was orally rescinded and it was agreed that the cost of local counsel would be borne by Hanover.

of compensation or reimbursement. Allowance of accountants' fees as a separate item was expressly rejected in Twentieth Century Fox Film Corp. v. Goldwyn, supra, 328 F. 2d 190, at pages 223-4. The application for travel disbursements as a separate item of compensation or reimbursement will be denied.

Judgment for attorneys' fees will be entered in accordance with this opinion.

Motion for a Partial New Trial, Etc.

Pursuant to Rule 59 of the Federal Rules of Civil Procedure and 28 U. S. C. A. § 1651(a), United filed a motion (1) for a new trial on the issues relating to the findings and decree in the Government case as described in this court's opinion; (2) for remission or certification of certain questions by this court to the United States District Court for the District of Massachusetts; and (3) for amendment of this court's findings of fact, conclusions of law and opinion and the entry of new findings of fact and conclusions of law directing dismissal of this action on the merits.

United contends that this court found that the lease-only system was condemned by Judge Wyzanski and that this court, in effect, found a legal duty to sell since the condemnation of lease-only implies as an inevitable logical alternative an obligation to sell; that in the Government case the lease-only system was not found to be in violation of the antitrust laws; that before the effective date of the decree there was no obligation to sell; that the reference to sale in the decree was remedial, and prospective only, with a view toward diminishing United's market power; and that these things being true, there is no basis for the decision

in favor of Hanover. United argues that these matters are apparent from the language of the decree itself and "does not require interpretation from the language of the opinion, findings and conclusions"; from certain passages in the voluminous trial record in the Government case; and from indications given by Judge Wyzanski in a colloquy preceding his denial on May 28, 1965, of United's application to the United States District Court for the District of Massachusetts, to construe or amend the decree in the Government case in accordance with United's contentions.

These contentions were urged upon and considered by this court prior to its decision. If this were merely an attempt to reargue these matters, the motion would be dismissed. United, however, in its motion affidavit has brought to the attention of this court for the first time certain passages in the Government case and in the colloquy. Hanover has not raised the question of whether this motion is properly brought pursuant to the "All Writs Act," 28 U. S. C. A. § 1651, or whether it conforms to Rule 59.

This court found that in the Government case the court held that United had monopolized trade in shoe machinery during the statutory period; and that the lease-only system was a monopolistic practice by the aid of which United maintained its monopolistic position. This court then concluded that United had a duty to abandon that policy or, to put it in another way, to refrain from illegal trade practices.[22]

There is nothing in the decree itself which compels a different conclusion. Judge Wyzanski did not hold, as United contends, that United monopolized the shoe ma-

[22]See, for example, pp. 12-17, 26-27, 38-39, 43 and 85.

chinery trade by the restrictive clauses and administration of the service clause. Rather he made a general finding that United monopolized the shoe machinery trade and commerce among the several states. He then described the lease clauses as practices which "are declared to have been means whereby defendant monopolized the shoe machinery market." But he did not say these were "the only" means or even "the" means. Yet United would have this court stop with this language, and ignore the rest of the decree. It is a familiar rule that in construing a document, a section should not be read in isolation from the whole. Cf. Richards v. United States, 1962, 369 U. S. 1, 11; Ideal Farms, Inc. v. Benson, 3 Cir. 1961, 288 F. 2d 608.

United argued in its brief on the merits, and now on the basis of passages from the record in the Government case, that Judge Wyzanski, both in his approach and in his findings, conclusions and opinion, separated the sale question from other questions. It calls attention to the language in the opinion designated "Opinion on Remedy." Even if it were clear that Judge Wyzanski intended to sectionalize his opinion, there is convincing language in the sections on "Effects of the Leasing System" and "Opinion on Alleged Violations" to support this court's construction.[23]

Judge Wyzanski's remarks during the May 28, 1965, colloquy also do not compel a different conclusion. In denying United's application from the bench Judge Wyzanski said that if he did have the power to grant the requested relief, he would not do it because the application was too late both with respect to Hanover and to other litigants. He also said he was loathe to take any action which could result

[23]See footnote 3, supra.

in an undercutting of the decision of another district court. He noted the remedies available by way of appeal and also the doubtful question of his power to act.

In denying the application, however, Judge Wyzanski said, ". . . I cannot understand how any person who was familiar with the whole course of this litigation could have any doubt whatsoever as to what had been my view of the conduct of the defendant, of the degree to which it had violated the Act and the degree to which the Decree was addressed *beyond eliminating violations* to setting forth a program of future conduct which would *make it hereafter less likely that the violations could continue.*" (Emphasis supplied.) This is a clear statement that the decree can be read retroactively and prospectively.

There is nothing in the colloquy to cause this court to change its construction of the decree, or to certify questions regarding its construction to the District of Massachusetts. The request is made belatedly not only to that court but also to this court. Even if this court were inclined to certify these questions to that court, this procedure should not be followed. The cases cited by United are distinguishable. The situation is unlike that in which a federal court withholds decision until a controlling issue of state law is decided by a state court. One sovereign is attempting to ascertain the law of another sovereign from the best possible source —the courts of the sovereign whose law is sought to be ascertained. The important thing is that the state court proclaims state law. This is not true here. As pointed out by Judge Wyzanski, if the application is proper, and if he were incapacitated, then some other judge of the District of Massachusetts should be asked to construe the decree merely because the opinion issued from that court.

This conclusion finds support in American Securit Co. v. Shatterproof Glass Corp., D. Del. 1958, 166 F. Supp. 813, *aff'd* 3 Cir. 1959, 268 F. 2d 769, *cert. denied* 1959, 361 U. S. 902, where the Delaware District Court had reached a decision based on the construction of a decree of an Ohio district court and thereafter enjoined American Securit, a party to that decree, from seeking a construction of the decree in the Ohio court. The Delaware court conceded that the Ohio court was peculiarly competent to construe the decree but pointed to the duplication of judicial effort and inconvenience and expense which would result if one party, after a decision has been rendered, is permitted to seek a different construction, especially where that party, being aware of his opponent's contentions, did not seek a timely construction of the decree. Subsequently, the Ohio court, without American Securit's participation and on its own initiative, construed its decree and reached a result different from that of the Delaware court. In affirming the judgment of the Delaware court, the court of appeals specifically noted that the author of the decree of the Ohio court construed it contrary to the Delaware court but said that it could not agree with this construction even though such construction was entitled to great weight. These same considerations apply here. While American Securit had chosen the Delaware court as the forum, this does not alter the result because Hanover had a right to choose this court as its forum, had obtained a decision, and should not now be required to relitigate the same matters.

One additional point requires brief mention. United stressed that a judgment of dismissal upon the merits was entered against W. B. Coon Co., a shoe manufacturer, and in favor of United in the United States District Court for

the Western District of New York, and the complaint therein was practically a copy of the complaint in the instant action. A review of the findings of fact in that case show Coon failed to introduce evidence that it would have purchased machines; that it had the means to do so; that it was dissatisfied with the leasing system; that United's acts caused damage to Coon; that lease prices were excessive; and that computed purchase prices and adjustments would have resulted in a fair and reasonable damage computation. Hanover's recovery is not based on excessive returns to United, and the other deficiencies in proof in the Coon case have been supplied.

The motion will be denied.

/s/ MICHAEL H. SHERIDAN
Chief Judge
Middle District of Pennsylvania

Dated: August 12, 1965.

Order

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[SAME TITLE]

Now, this 12th day of August, 1965, the motion of defendant, United Shoe Machinery Corporation, pursuant to Rule 59 of the Federal Rules of Civil Procedure, for a partial new trial, is denied.

/s/ MICHAEL H. SHERIDAN
Chief Judge
Middle District of Pennsylvania

Judgment

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[SAME TITLE]

This action came on for trial before the Court, Honorable Michael H. Sheridan, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the Plaintiff, The Hanover Shoe, Inc., recover of the Defendant, United Shoe Machinery Corporation, the sum of $4,239,609.00, with interest thereon at the rate of 6 per cent as provided by law, and its costs of action.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, The Hanover Shoe, Inc. recover of the defendant, United Shoe Machinery Corporation, attorneys' fees in the sum of $600,000.00 for the services of plaintiff's attorneys, Messrs. Donovan Leisure Newton & Irvine, and in the sum of $50,000.00 for the services of plaintiff's attorneys, Messrs. Nogi, O'Malley & Harris.

Dated at Scranton, Pennsylvania, this 13th day of August, 1965.

/s/ MICHAEL H. SHERIDAN
Chief Judge
Middle District of Pennsylvania

Notice of Appeal

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that the above-named defendant hereby appeals to the United States Court of Appeals in and for the Third Circuit from the judgment herein dated August 13 1965, the findings of fact, conclusions of law and opinion herein filed April 28 1965, the supplemental and amended findings of fact, conclusions of law and opinion dated August 12 1965, and the order of this Court dated August 12 1965 denying defendant's motion for a partial new trial.

DAVIS POLK WARDWELL SUNDERLAND & KIENDL

By RALPH M. CARSON
A Member of the Firm
1 Chase Manhattan Plaza
New York, N. Y. 10005

WARREN, HILL, HENKELMAN & MCMENAMIN

By .....
A Member of the Firm
Scranton Electric Building
Scranton, Pa.
Attorneys for Defendant

Dated: Scranton, Pa.
August 20 1965

Notice of Appeal

To:

THE CLERK OF THIS COURT

MESSRS. NOGI, O'MALLEY & HARRIS
Miller Building
Scranton, Pa.

MESSRS. DONOVAN LEISURE NEWTON & IRVINE
2 Wall Street
New York, N. Y.
Attorneys for Plaintiff

Notice of Cross-Appeal

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 5395

THE HANOVER SHOE, INC.,

Plaintiff,

v.

UNITED SHOE MACHINERY CORPORATION,

Defendant.

Notice is hereby given that The Hanover Shoe, Inc., plaintiff in the above entitled action, hereby cross appeals to the United States Court of Appeals for the Third Circuit from the final judgment of this Court entered in this action on August 13, 1965, the Findings of Fact, Conclusions of Law and Opinion filed April 28, 1965 and the Supplemental and Amended Findings of Fact, Conclusions of Law and Opinion dated August 12, 1965, in so far as said final judgment and said Findings of Fact, Conclusions of Law and Opinions excluded from damages, as calculated and determined by the Court, the amount of $324,356.00, prior to trebling, relating to the Outsole

Rapid Lockstitch Machine for the period July 1, 1939-September 21, 1955.

Dated: Scranton, Pa.
September 10, 1965

NOGI, O'MALLEY & HARRIS
By s/ NORMAN HARRIS
Miller Building
Scranton, Pennsylvania

DONOVAN LEISURE NEWTON & IRVINE
By s/ BRECK P. MCALLISTER
2 Wall Street
New York, New York 10005
Attorneys for Cross-Appellants

To:

THE CLERK OF THIS COURT

WARREN, HILL, HENKELMAN & MCMANAMIN
Scranton Electric Building
Scranton, Pennsylvania

DAVIS POLK WARDWELL SUNDERLAND & KIENDL
1 Chase Manhattan Plaza
New York, New York 10005

Opinion of the Court

(Filed April 11, 1967)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 15626

THE HANOVER SHOE, INC.

v.

UNITED SHOE MACHINERY CORPORATION,

Appellant.

No. 15627

THE HANOVER SHOE, INC.,

Appellant,

v.

UNITED SHOE MACHINERY CORPORATION

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Argued May 3, 1966

Before FOREMAN, GANEY and FREEDMAN, *Circuit Judges*

FREEDMAN, *Circuit Judge:*

This private antitrust action presents a number of important questions.

Plaintiff, The Hanover Shoe, Inc., is a manufacturer of shoes and a customer of defendant, United Shoe Machinery Corporation, a manufacturer and distributor of shoe machinery. In this action brought under § 4 of the Clayton Act (15 U.S.C. § 15) based on violations of § 2 of the Sherman Act (15 U.S.C. § 2) Hanover obtained a trebled damage judgment against United in the amount of $4,239,609, with interest, and an award of $650,000 for counsel fees. United appeals from the judgment on a number of grounds, and Hanover has taken a cross-appeal on the ground that there was not sufficient evidence to support the district court's rejection of one of its large items of damage.

THE PROCEEDINGS

Almost twenty years ago, on December 15, 1947, the United States brought a civil action against United in the United States District Court for the District of Massachusetts, under § 4 of the Sherman Act (15 U.S.C. § 4) to restrain alleged violations of §§ 1 and 2 of the Act (15 U.S.C. §§ 1, 2). Judge Wyzanski, who heard the case graphically detailed what he called the "prodigious length" of the trial. "[T]he hearings took 121 days and covered 14,194 pages of transcript and included the offer of 5512 exhibits totalling 26,474 pages (in addition to approximately 150,000 pages of OMR's [records concerning machines in shoe factories as of a certain date] and over 6,000 soft copies of patents) and 47 depositions covering 2122

pages. At the close of the evidence the Court asked for briefs, and requested findings of fact and conclusions of law. The Government offered briefs totalling 653 pages, and requests totalling 667 pages. United submitted briefs totalling 1240 pages, and requests totalling 499 pages."[1] On February 18, 1953, Judge Wyzanski filed an elaborate opinion in which he found that United was guilty of monopolization in violation of § 2 of the Sherman Act. *United States v. United Shoe Machinery Corp.*, 110 F.Supp. 295 (D.Mass. 1953). The Supreme Court affirmed on May 17, 1954 in a per curiam opinion. *United Shoe Machinery Corp. v. United States*, 347 U.S. 521 (1954).

More than a year later, on September 21, 1955, Hanover brought the present treble damage action against United in the United States District Court for the Middle District of Pennsylvania. By pretrial agreement the parties submitted for preliminary decision the defense that any excessive rentals charged to Hanover for shoe machinery would not constitute an injury to its business or property if the excess was passed on to its customers. After the hearing had been held on this issue the district judge died and Chief Judge Biggs designated Circuit Judge Goodrich in his place. Judge Goodrich summarized the complaint as charging that defendant, "as a result of its unlawful control of the market, has caused plaintiff . . . to pay excessive rentals for the lease of shoe machinery." He held as a matter of law that if United was guilty of monopolization and had charged Hanover excessive rentals, Hanover had a cause of action for the difference between what it was charged and what it could properly have been charged in the ab-

1. United States v. United Shoe Machinery Corp., 110 F.Supp. 295, 299 (D.Mass. 1953), aff'd, 347 U.S. 521 (1954).

sence of monopolistic practices. He also held that the injury occurred when Hanover was overcharged for the machinery and that since the cause of action arose at the moment the tort occurred, United would not be relieved of liability because subsequent events might have alleviated some of the ultimate consequences of the wrong, for these would not inure to the benefit of the defendant. Judge Goodrich certified that the case was appropriate for an interlocutory appeal under 28 U.S.C. § 1292(b), because the issue involved a controlling question of law as to which there was substantial ground for difference of opinion, and an immediate appeal might materially advance the ultimate termination of the litigation. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 185 F.Supp. 826 (M.D.Pa. 1960). We affirmed in a per curiam opinion in which we rejected the claim that treble damages would result in a windfall to Hanover, stating that Congress had imposed this rigorous penalty and any modification was for it to make and not for the courts. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 281 F.2d 481 (3 Cir. 1960), cert. denied, 364 U.S. 901 (1960).

After a subsequent trial without a jury, Chief Judge Sheridan on April 28, 1965 filed a comprehensive opinion holding that Hanover was entitled to recover treble damages for the excess of the leasing costs over what it would have cost to own the same machines had they been available for purchase. Damages were limited to the period beginning July 1, 1939 on the ground that any earlier period was barred by the Pennsylvania statute of limitations, and were awarded to September 21, 1955, the date the action was brought. *The Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 245 F.Supp. 258 (M.D.Pa. 1965).

Hanover's alternative claim for damages, that the leasing charges were themselves excessive, was rejected by the district court because the Government decree, on which Hanover relied, had made no finding that United's leasing charges were excessive. Hanover has not sought review of this ruling on appeal. On August 12, 1965 Chief Judge Sheridan denied United's motion for a new trial, and entered the judgment from which these appeals are taken.

Acquiescence and Demand

At the outset United contends that Hanover acquiesced in its leasing system which helped Hanover to obtain high profits and gave Hanover special benefits such as the right to return obsolete machines and the free services of United's technicians on problems in shoe making. According to United, the absence of a formal demand by Hanover for the sale of United's shoe machinery is fatal to Hanover's claim.

The court below found that "Hanover has proved that as a consequence of United's monopolization it was unable to purchase most of the more important machines which it would have purchased had they been available." 245 F. Supp. at 287. This finding negatives any inference of acquiescence in the United leasing system. The finding in the Government case of the existence of the monopoly and of United's policy against sales, the participation of Mr. Sheppard, Hanover's president, in the effort of a trade association of which he was president to persuade United to offer more of its machinery for sale and Hanover's purchase of machinery from United when it first became possible to do so by virtue of the Government decree, sufficiently support

the finding by the court below and forbid our declaring it to be clearly erroneous.

The question remains, however, of the necessity of a formal demand for the purchase of machines during the damage period. On this issue the court below found: "Hanover never asked United if it could buy the lease-only machines. Neither did it protest its inability to buy. Mr. Sheppard testified that any such request would have been a 'foolish question.' This explanation does not seem unreasonable in view of the findings in the Government case and the evidence in this case." 245 F.Supp. at 280.

Hanover was, as the court below found, along with the entire shoe machinery industry, a "captive customer" of United. What the witness characterized as foolish amounts to a futile gesture which the law does not require. Hanover had been a customer of United in the leasing of machinery for many years. It was well aware of United's power as the supplier of machinery and of its policy against sales. In such circumstances it would be ironic as well as idle to require the victim of the monopoly to make an explicit demand the denial of which was implicit in the continuance of the monopoly. See *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

INJURY

1. United urges that its leasing system did no injury to Hanover because Hanover's competitors were subject to the same practices which United uniformly imposed on all its customers. This is a remarkable proposition. It is founded upon the premise that harm done to a customer loses its injurious effect when similar harm is inflicted upon

other customers similarly situated. It would punish a partial wrong but absolve it if it is widespread and thus would reduce the antitrust laws to a moral imperative without realistic effect. There is no reason to relieve actual injury on a basis so unrealistic and undesirable. *Keough v. Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922) does not require us to do so. There a shipper sued several railroads for treble damages on the ground that they had by agreement among themselves fixed excessive freight rates. United relies on the statement by Mr. Justice Brandeis that the exaction of the alleged excessive rate, which had been approved by the Interstate Commerce Commission, might not have harmed the plaintiff because all other shippers were entitled to be put on a parity with him. What was involved in *Keough*, however, was a case of "plain repugnancy between the antitrust and regulatory provisions,"[2] for the plaintiff was held barred from invoking the original treble damages provision of the Sherman Act because he was limited to the remedy provided by §8 of the Interstate Commerce Act which conferred a right to untrebled damages where a carrier charged an illegal rate. The statement relied on by United plainly was dictum and was unnecessary to the decision in the case; it is not controlling here. See, e.g., *Commonwealth Edison Co. v. Allis-Chalmers Manufacturing Co.*, 335 F.2d 203, 205-6 (7 Cir. 1964); *Atlantic City Electric Co. v. General Electric Co.*, 226 F.Supp. 59, 65-66 (S.D.N.Y. 1964).

2. United also contends that Hanover suffered no injury from United's no-sale policy in the damage period

2. See United States v. Philadelphia National Bank, 374 U.S. 321, 351 (1963); Pan American World Airways, Inc. v. United States, 371 U.S. 296, 322 (1963), Brennan, J., dissenting.

because it could have obtained foreign machinery. The court below found, however, that the foreign machinery which was available was not aceptable to Hanover both because of its inadequate capacity and performance and the lack of available servicing and technical advice. 245 F. Supp. at 285, 286. We cannot say from the record that this finding is clearly erroneous.

3. United claims that Hanover was not legally injured because the leases were lawful and therefore no damage could result from them. The claim of legality of the leases is based on an abstract characterization, torn from the context of United's market control. Judge Wyzanski specifically held that the leases which United employed constituted a means of its monopolization of the industry. Since the leases, although valid as instruments conferring the right of possession on the lessee, were instruments of monopolization, their lawfulness in the abstract does not undo their character as weapons in the consummation of the monopoly: Neither *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743 (1947) nor *Kelly v. Kosuga*, 358 U.S. 516 (1959) are of aid to United. They refused to allow a party to a contract to avoid payment thereunder because the underlying contract violated the antitrust laws. This was because the antitrust laws do not provide such a remedy: "The Act prescribes sanctions, and it does not make uncollectibility of the purchase price one of them." *Bruce's Juices, Inc. v. American Can Co., supra* at 750. The court expressly recognized, however, that the appropriate remedy for injury resulting from a violation of the antitrust laws was a treble damage suit. What was said in those cases regarding contracts which are intrinsically or inher-

ently illegal related merely to the right to avoid payment thereunder and not to the remedy available for violation of the antitrust laws.[3]

4. United also claims that Hanover passed on to its customers the difference between what it paid to United in rentals and what it would have cost it to purchase the machines. The validity of a passing-on defense in this case was decided by Judge Goodrich in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 185 F.Supp. 826 (M.D.Pa. 1960), aff'd, 281 F.2d 481 (3 Cir. 1960), cert. denied, 364 U.S. 901 (1960). United seeks to distinguish the effect of the decision because it was based on the assumption that the damage claim was for excessive rental charges, whereas the judgment below is based on the difference between the rentals charged and the reasonable cost of the machinery if Hanover had purchased it.

Even if we assume that Judge Goodrich's determination of the passing-on issue is not binding here, his reasoning, which we accept, extends equally to the present claim. As we have seen, he pointed out that the antitrust laws deal with a plaintiff at the moment of injury and do not look to subsequent events which may have reduced the impact of the wrongful conduct. The fact that Hanover might have recouped some of that damage later by increasing the prices of its shoes is irrelevant to the question of damage. We may, indeed, add that if United's claim

3. Turner Glass Corp. v. Hartford-Empire Co., 173 F.2d 49 (7 Cir. 1949), was a special antitrust case involving patents in which plaintiff conceded that it would not be entitled to recover unless the agreements were inherently illegal. In any event, to the extent that it would support United's claim that the leases must be inherently illegal to support an antitrust action for damages, we decline to follow it.

were accepted it would be difficult to apply the antitrust laws in a prosperous industry, where damages would readily be passed on to the consuming public. It would be contrary to the far-reaching social and economic purposes of the antitrust laws to afford release from their obligations to an economic wrongdoer because his victim in self-defense sought recoupment for the injury from the consuming public.

Our decision in *Freedman v. Philiadelphia Terminals Auction Co.*, 301 F.2d 830 (3 Cir. 1962), cert. denied, 371 U.S. 829 (1962), does not impair our rejection of passing-on as a defense by a violator of the antitrust law. There fruit brokers brought a treble damage suit for violation of the Robinson-Patman Act resulting from an improper terminal charge. The brokers had purchased the fruit at the defendant's auction on behalf of regular clients and the jury made a special finding that plaintiffs suffered no injury because they received a separate commission for their services, and their clients paid all the charges, including the terminal charges. In upholding the passing-on defense we specifically distinguished the case from the present one. Judge Kalodner, speaking for the Court, said: "Hanover affords no nourishment to plaintiffs' contention with respect to it. There the District Court in granting relief to the plaintiff premised its action on its fact-finding that plaintiff was a *consumer* and not a *middleman* and implicit in that distinction is its subscription to the doctrine enunciated in earlier cases that middlemen cannot recover damages where they suffer no injury by reason of their payment of proscribed charges." (p. 833). Moreover, the question of multiple liability is fundamental in determining whether the passing-on defense shall have

validity. See *Commonwealth Edison Co. v. Allis-Chalmers Manufacturing Co.*, 335 F.2d 203, 208-9 (7 Cir. 1964); *Atlantic City Electric Co. v. General Electric Co.*, 226 F.Supp. 59, 71 (S.D.N.Y. 1964). This explains the difference between the present case and *Freedman*. There it was the clients of the brokers who had the direct injury which would support treble damage claims against the auctioneer. Here, however, the injury to the customers who purchased the shoes which Hanover made with the machinery it acquired from United is too remote and its force too fragmentized and diluted to support a claim by the individual customers of Hanover.[4]

REMOTENESS OF INJURY

What has been said regarding the passing-on defense supplies in part the answer to United's contention that any damage that Hanover suffered is too remote and indirect to support a cause of action under § 4 of the Clayton Act, which requires not only injury, but also a causal relationship between the antitrust violation and the injury.[5] The court below found that "Hanover's injury flows proximately from the monopolization," and that by the leases United extracted "large sums of money in excess of the

4. Wolfe v. National Lead Co., 225 F.2d 427 (9 Cir. 1955), cert. denied, 350 U.S. 915 (1955), which United urges upon us, was specifically rejected by Judge Goodrich (185 F.Supp. at 831) whose opinion we affirmed.

5. "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

reasonable value of machinery and of the service rendered by United." 245 F.Supp. at 274. In this respect the case resembles *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906), where it was held that injury was sufficiently demonstrated by the City's payment of more than the reasonable price of the defendant's pipes because of defendant's price fixing.[6] Here, as in that case, the cost to the customer of doing business was increased as a result of the monopolist's conduct. The consequences of the injury therefore were direct and the cause of action under the narrowest construction of § 4[7] was made out. In the context of the relation of machinery monopolist and customer manufacturer no more direct injury could be inflicted.

Effect of the Government Decree as to the Lease-Only Policy

Section 5a of the Clayton Act (15 U.S.C. § 16a) makes the Government decree "prima facie evidence" against United in the present action "as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto."

Here the Government decree expressly declared that United's leases with any one of four specified restrictive

6. See also Georgia v. Evans, 316 U.S. 159 (1942).

7. It is unnecessary for us to consider whether the broad terms of the statute should be narrowed by construing § 4 to require that the injury be "direct," Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9 Cir. 1955), or whether a presumption of liability exists once injury has been shown, South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4 Cir. 1966); Note, Standing to Sue for Treble Damages under Section 4 of the Clayton Act, 64 Colum. L. Rev. 570, 586-88 (1964). See also Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962).

provisions—a term of ten years, a full capacity clause, deferred charges on return and non-segregation of repair and service charges—were means by which United had monopolized the shoe machinery industry. The decree does not contain any comparable declaration regarding United's failure to make shoe machinery available for sale. From this United argues that the Government decree is not prima facie evidence that its failure to offer shoe machinery for sale was illegal, since this is not a matter which was adjudicated in the Government case. For additional support it points to the fact that Paragraph 61 of the Government's complaint expressly alleged that United had refused to sell machinery, and urges that this was one of the "other charges of violation of the Sherman Act set forth in the complaint" which Section 2 of the Government decree declared "are dismissed with prejudice." On the face of the decree, therefore, United's contention is not lacking in merit.

United supports its contention by the claim that the courts are limited to the Government decree itself in determining the existence and extent of an estoppel under § 5a unless it is necessary to go beyond it to resolve an ambiguity in the decree. Such a construction of § 5a would seriously weaken its underlying policy of lightening the burden on private antitrust plaintiffs, who play such an important role in the implementation of the antitrust laws.[8] It is in harmony with that policy to give prima facie effect

8. See, e.g., Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751-52 (1947); Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 567-68 (1951); Radovich v. National Football League, 352 U.S. 445, 453-54 (1957); Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318-19 (1965).

to any fact which the findings or the opinion fairly show was actually adjudicated in the Government case.[9] To do otherwise would hamper on a technicality of form the policy of affording private antitrust litigants the fullest benefit of a successful Government suit. In *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 568-69 (1951) the Supreme Court held that a criminal judgment was available to private litigants as prima facie evidence of "all matters of fact and law necessarily decided by the conviction and the verdict," since § 5a embodied a Congressional policy "to confer, subject only to a defendant's enjoyment of its day in court against a new party, as large an advantage as the estoppel doctrine would afford had the Government brought suit." This goes further than the use of the determinations which appear in the findings and opinion of the judge sitting without a jury in a civil case.

United would distinguish *Emich* on the ground that it rested on a general verdict of guilty which does not specifically indicate the nature of the jury's findings and that the conclusion in that case therefore was a result of necessity. The absence of any factual finding in a criminal verdict is no reason for holding that findings by a judge without a jury in a civil case are to be ignored because his decree is more elaborate.

We turn then for illumination to the elaborate findings of fact and opinion of Judge Wyzanski which accompanied the decree. A separate heading entitled "Effects of the Leasing System" in the findings of fact describes the

9. Under Rule 52(a) findings of fact and conclusions of law need not be isolated under such specific designations if they appear generally in the opinion of the court.

effect of United's leasing system as it worked in practice from the viewpoint of United, of shoe manufacturers and of potential and actual competitors of United. In dealing with the effect of United's leasing system on shoe manufacturers, there is a full appraisal of the advantages to the shoe manufacturer and note is made of the virtual absence of dissatisfaction with the system. Judge Wyzanski then went on to say: "However, while United's system has made it easier to enter the shoe manufacturing industry than to enter many, perhaps most, other manufacturing industries, it has not necessarily promoted in the shoe manufacturing field the goals of a competitive economy and an open society. Without attempting to make findings that are more precise than the evidence warrants, this much can be definitely stated." 110 F.Supp. at 323-24. There follow six consequences to shoe manufacturers if United's machinery were available for sale. Among these is the fact that shoe manufacturers who bought United's machines "would not be subject, as are those manufacturers who lease United machines, to the unilateral decision of United whether or not to continue or modify those informal policies which are not written in the leases and to which United is not expressly committed for any specific future period. . . . United's reserved power with respect to these matters gives it some greater degree of psychological, and some greater degree of economic control, than a seller of machinery would have." 110 F.Supp. at 324. In another category is this statement: "Some manufacturers who had bought machinery would find that financial and psychological considerations made them more willing than lessees would be, to dispose of already acquired United machines

and to take on competitors' machines in their place." 110 F.Supp at 324. These statements are reiterated in a form which shows that this effect was inherent in the lease-only system itself, and did not arise solely from the four restrictive features: "Yet as already noted, a shoe manufacturer may psychologically or economically be more impeded by a leasing than by a selling system. And this general observation is buttressed by a study of features in the United leasing system which have a special deterrent effect." 110 F.Supp. at 324.

Throughout his opinion Judge Wyzanski repeatedly stressed this distinction between the special obstacles to competition established by the four restrictive provisions in the United leases, and the general anti-competitive effects which flowed from the mere existence of a lease-only system. On the latter issue, he recognized the "magnetic ties inherent in [United's] . . . system of leasing, and not selling, its more important machines," and stressed that these ties, especially in the context of United's market control, fostered a sense of "partnership" among United and its customers which made it more difficult for another manufacturer of shoe machinery to take away part of the United market.[10] Moreover, he declared that the end of

10. "However, United's leases, in the context of the present shoe machinery market, have created barriers to the entry by competitors into the shoe machinery field.

"First, the complex of obligations and rights accruing under United's leasing system in operation deter a shoe manufacturer from disposing of a United machine and acquiring a competitor's machine. He is deterred more than if he owned that same United machine, or if he held it on a short lease carrying simple rental provisions and a reasonable charge for cancellation before the end of the term. The lessee is now held closely to United by the combined effect of the 10-year term, the requirement that if he has work available he must use the machine to full capacity, and by the return charge which can in practice, through the right of deduction fund, be reduced to insignificance if

the lease-only system would also increase competition by

he keeps this and other United machines to the end of the periods for which he leased them." 110 F.Supp. at 340.

"In estimating defendant's strength, this Court gives some weight to the 75 plus percentage of the shoe machinery market which United serves. But the Court considers other factors as well. In the relatively static shoe machinery market where there are no sudden changes in the style of machines or in the volume of demand, United has a network of long-term, complicated leases with over 90% of the shoe factories. These leases assure closer and more frequent contacts between United and its customers than would exist if United were a seller and its customers were buyers. Beyond this general quality, these leases are so drawn and so applied as to strengthen United's power to exclude competitors." *Id.* at 343.

"But United's control does not rest solely on its original constitution, its ability, its research, or its economies of scale. There are other barriers to competition, and these barriers were erected by United's own business policies. Much of United's market power is traceable to the magnetic ties inherent in its system of leasing, and not selling, its more important machines. The lease-only system of distributing complicated machines has many "partnership" aspects, and it has exclusionary features such as the 10-year term, the full capacity clause, the return charges, and the failure to segregate service charges from machine charges. Moreover, the leasing system has aided United in maintaining a pricing system which discriminates between machine types." *Id.* at 344.

"Furthermore, the creation of a sales market together with the purging of the restrictive features of the leases will, in combination, gradually diminish the magnetic hold now exercised by what United properly describes as the partnership features of the leasing system. As United's relationships with its customers grow feebler, competitors will have an enhanced opportunity to market their wares. . . .

"A further answer is that if the creation of a sales alternative to leasing is, as this Court believes, necessary to dissipate United's monopoly power, the Court should not withhold its degree because its effect is to allow competitors to copy United's designs." *Id.* at 350.

See Kaysen, United States v. United Shoe Machinery Corporation (1956), p. 275: "The most important single alteration in the operation of the shoe machinery market leading to an increase in the degree of competition therein is the end of the lease method of marketing, and the dissolution of the lease bundle which United provides under that method." See also pp. 193-94, 197-98, 276. Kaysen, an economist, acted as Judge Wyzanski's law clerk so that he could serve as an economic assistant on the United Shoe case. Kaysen's book is a reprint, with additional material, of the memorandum which he submitted to Judge Wyzanski after two years of research.

making available secondhand machines, which would promote a "substitute competition" and would make it possible for other manufacturers to study the United machines so as to experiment with alterations in them and to copy their unpatented features.[11] Finally, although he ordered United's leases to be purged of their restrictive provisions in the future, he also ordered United in Section 5 of the decree to offer for sale in the future any machine which it held out for lease. Judge Wyzanski thus justified this provision: "[United] has used its leases to monopolize the shoe machinery market. And if leasing continues without an alternative sales system, United will still be able to monopolize that market. To root out monopolization and to bring United, in the future, in the same class as its competitors, it is necessary not merely to place limitations upon United's leases, but also to require United to offer for sale any machine type which it leases. While, on its face, the decree seems to discriminate against United, in the context of the market situation created by United itself, the effect of the decree is to break down barriers erected by a monopolizer, so that, hereafter, there may be no wall between the class in which it is and the class in which its competitors are."[12] Rejecting the Government's suggestion that the decree require United to make its sales terms

11. 110 F.Supp. at 344, 349-50. See also Kaysen, supra, at p. 73: ". . . the absence of a second-hand machinery market, which is a consequence of the leasing system, is a substantial support to United's market dominance and is probably second in importance in its effect on United's market power only to the duration of the lease and the circumstances surrounding terminations of leases among all the aspects of the leasing system which affect that power."

12. 110 F.Supp. at 350.

more attractive to customers than its lease terms, the opinion states: "[I]t seems to the Court sufficient to direct defendant, if it offers any machine type for lease, to set such terms for leasing that machine as do not make it substantially more advantageous for a shoe factory to lease rather than to buy a machine." 110 F.Supp. at 351.

All this, we believe, demonstrates that the lease-only system itself was adjudicated in the Government case to be a means of monopolization. Read in the light of the policy of making the Government's decree fully available to the private antitrust plaintiff, Hanover is entitled to the benefit of the determination and United is estopped from questioning it. See *Emich Motors Corp. v. General Motors Corp., supra,* at 568.

THE RETROSPECTIVE EFFECT OF THE GOVERNMENT DECREE

The court below concluded that the adjudged violations were illegal from their initiation decades earlier, but it limited damages to the period within the statute of limitations as suspended by various tolling provisions. See 245 F.Supp. at 294, n. 15.

The Government decree, entered in the District Court in Massachusetts on February 18, 1953 and affirmed by the Supreme Court on May 17, 1954, prohibited United after "A-Day," which turned out to be January 1, 1955, from offering machines for lease unless it also offered them for sale. United urges that the decree was meant to operate only prospectively. In support of this view it points to the absence of any specific declaration in the decree that the lease-only system violated the antitrust law and maintains that the exclusive purpose of the decree was to break up United's market power in the future.

What we have already said requires us to reject the contention that the Government decree has no retrospective effect. For the remedial character of an equity decree does not necessarily imply that the conduct which it prohibits in the future was valid in the past. Decrees such as the Government decree are aimed at redressing the effects of antitrust violations in the future, and acceptance of United's contention would subvert the purpose of § 5a, for it would put an end to treble damage recovery by private parties in reliance on Government decrees, since they are prima facie evidence only in cases where the damage period is within the period covered by the Government case. *International Shoe Machinery Corp. v. United Shoe Machinery Corp.*, 315 F.2d 449 (1 Cir. 1963), cert. denied, 375 U.S. 820 (1963); *Dart Drug Corp. v. Parke, Davis & Co.*, 344 F.2d 173, 184-86 (D.C.Cir. 1965).[13]

This leads us to the question of the extent of the retroactivity of the Government decree.

Judge Wyzanski made vividly clear the extraordinary position of United in regard to the antitrust laws. Three times, in 1913, in 1918 and in 1922, United had been under the scrutiny of the Supreme Court. *United States v. Winslow*, 227 U.S. 202 (1913); *United States v. United Shoe Machinery Co. of N.J.*, 247 U.S. 32 (1918); *United*

13. There is no dispute that United machines leased by Hanover were unavailable for sale to Hanover before June 1, 1955, the date on which Judge Wyzanski approved United's plan for terminating the leases. Moreover, the court below made specific findings as to the unavailability and unsuitability of other manufacturers' machines which were offered for sale for any part of the 1939-1955 period. In these circumstances, Hanover is not barred from damages occurring before June of 1951, the date of the close of evidence in the Government case (Compare International Shoe Machinery Corp. v. United Shoe Machinery Corp., supra), nor does United so argue.

Shoe Machinery Corp. v. United States, 258 U.S. 451 (1922). In Judge Wyzanski's words: "What United is now doing is similar to what it was then doing, but the activities which were similar stood uncondemned,—indeed, one ought to go further and say they were in part endorsed." 110 F.Supp. at 348.[14] He held that the last two cases still had enough vitality to prevent his holding, as he otherwise would, that United had violated § 1 of the Sherman Act by its lease-only practice. "[T]his inferior court feels precluded," said Judge Wyzanski, "from so deciding because of the overhanging shadows of . . . the Sherman and Clayton Act cases involving this company's predecessor and itself. Though these cases may ultimately be overruled by the Supreme Court, they have not yet lost all authority." 110 F.Supp. at 343. Judge Wyzanski was of the view, however, that the interpretation of § 2 of the Sherman Act was significantly changed in 1946 when the Supreme Court in *American Tobacco Co. v. United States*, 328 U.S. 781, 811-15 (1946) expressly approved Judge Learned Hand's analysis in 1945 in the *Alcoa* case, *United States v. Aluminum Co. of America*, 148 F.2d 416 (2 Cir. 1945). Judge Wyzanski stressed the absence in United's conduct of predatory practices, which the decisions prior to *Alcoa* had emphasized as an element in monopolization.[15] He held that United's conduct now ran afoul, however, of § 2 under the *Alcoa* doctrine, which brought within its prohibition monopolization attained by conduct which although

14. This was so even though certain provisions of its leases, since terminated, had been held violative of § 3 of the Clayton Act in the third case, for United was specifically found free of the taint of predatory practices. 258 U.S. at 455.

15. See, e.g., United States v. United States Steel Corp., 251 U.S. 417 (1920).

"honestly industrial" cannot be said to render market control, which is inherently evil, an economically inevitable result, for in such a case it cannot be said of a defendant that greatness was thrust upon him. 110 F.Supp. at 341-42. In so finding, however, Judge Wyzanski said: "It is only fair to add that the more than 14,000 page record, and the more than 5,000 exhibits, representing the diligent seven year search made by Government counsel aided by this Court's orders giving them full access to United's files during the last 40 years, show that United's power does not rest on predatory practices. Probably few monopolies could produce a record so free from any taint of that kind of wrongdoing." 110 F.Supp. at 345.

In these circumstances, we believe it was error to hold that United was liable in damages to Hanover for the period stretching back to the beginning of its conduct, despite the approval of its leasing policy in various forms by three successive decisions of the Supreme Court. The court below cut off damages prior to July 1, 1939 only because the statute of limitations barred such recovery. On the contrary, we think it erroneous to award damages for conduct manifestly pursued in the shelter of Supreme Court approval, at least until such time as subsequent decisions have clearly announced a change in the applicable law. This conclusion follows from Judge Wyzanski's opinion and the modern view of the rights of parties who have relied upon authoritative statements of the law which are later changed.

Recent decisions of the Supreme Court in criminal cases have made it clear that the unrealistic theory that the law has always been what the latest case for the first time declares it to be, the so-called Blackstonian view, must yield

to the practical realization that conduct had occurred in reliance on the earlier rules of law to the contrary.[16] In antitrust cases the question of retroactivity is still open.[17] We believe that retroactivity should be determined from the circumstances of the particular case, having in mind the purpose which the new rule of law seeks to accomplish and the practical weighing of the comparative benefits and evils of retroactivity. In civil cases, unlike criminal cases, it is appropriate to recognize that businessmen must rely upon counsel, who in turn are guided by the existing precedents in making difficult decisions on the effect of the antitrust laws on specific business conduct. In suits for damages in such cases it is particularly appropriate to be mindful of the injustice of retroactive imposition of the penalty of treble damages. In the present case the penalty of treble damages is enough, in conjunction with the absence of predatory practices and the survival of United's leasing policy under the Sherman Act after three passages through the Supreme Court, to require that United should not be held to have violated the antitrust laws before the change occurred in the law which for the first time made its conduct unlawful.

16. Thus, e.g., retroactivity was refused to be accorded in Linkletter v. Walker, 381 U.S. 618 (1965), to Mapp v. Ohio, 367 U.S. 643 (1961), dealing with exclusion of illegally seized evidence; in Tehan v. United States ex rel. Shott, 382 U.S. 406 (1966), to Griffin v. California, 380 U.S. 609 (1965), dealing with comment on the failure of a defendant in a state criminal trial to take the stand; in Johnson v. New Jersey, 384 U.S. 719 (1966), to Escobedo v. Illinois, 378 U.S. 478 (1964) and Miranda v. Arizona, 384 U.S. 436 (1966), dealing with custodial police questioning of criminal suspects. See also Butcher v. Philadelphia, 380 Pa. 290 (1955).

17. Simpson v. Union Oil Co., 377 U.S. 13, 24-25 (1964); see also Lyons v. Westinghouse Electric Corp., 235 F.Supp. 526, 536-37 (S.D.N.Y. 1964).

The remnant of the problem which remains is whether the appropriate date which marks the commencement of liability should be the date of the *American Tobacco* decision of June 10, 1946 or the *Alcoa* decision of March 12, 1945. The high authority of Judge Hand's opinions and the unusual circumstances in which *Alcoa* came to be decided give the case a place of preeminence in the history of antitrust law. We do not believe, however, that another business which had three times in various forms been adjudged free from violation of the Sherman Act was required to abandon its well known form of operation before Judge Hand's view in *Alcoa* received the imprimatur of the Supreme Court, however inevitable it may now seem in retrospect. At the time it was well known that *Alcoa* could not be passed on by the Supreme Court,[18] and whether it would agree with

18. The decision in Alcoa by the Circuit Court of Appeals for the Second Circuit was final because of the unique circumstances which surrounded the case. The district court had dismissed the complaint, United States v. Aluminum Co. of America, 44 F.Supp. 97 (S.D.N.Y. 1941), and on a direct appeal the Supreme Court was without a quorum due to the disqualification of four Justices. The Court therefore transferred the case to a special docket and postponed further proceedings in the appeal until such time as there was a quorum of Justices qualified to sit in the case. 320 U.S. 708 (1943). Congress thereafter amended 15 U.S.C. § 29 by the Act of June 9, 1944, ch. 239, 58 Stat. 272, which provided that in such circumstances the Court should certify the case to the appropriate circuit court of appeals, in lieu of a decision by the Supreme Court, and the decision of the circuit court of appeals should be final and unreviewable. Acting under the statute the Supreme Court certified the case to the Circuit Court of Appeals for the Second Circuit and it was in what Mr. Justice Frankfurter concurring in United States v. United States District Court for the Southern District of New York, 334 U.S. 258, 265 (1948) called "an extraordinarily rare, if not unique, situation in the history of the Court," that Judge Learned Hand's decision came to be written in Alcoa. See also American Tobacco Co. v. United States, 328 U.S. 781, 811-12 (1946).

Judge Hand's opinion could only be made known in another case, as it was a year later in *American Tobacco* on June 10, 1946.

We conclude, therefore, that United's conduct cannot be held to have violated § 2 of the Sherman Act at any time prior to June 10, 1946. We believe this is the effect to be given to the Government decree. The damages recoverable by Hanover therefore may not reach any earlier period.

CERTIFICATION

United urges that the court below should have certified to the District Court in Massachusetts the questions dealing with the interpretation and effect of that court's decree. The obvious economy in judicial effort which would follow from such a practice, especially in a case as protracted as the Government suit against United, speaks strongly in its favor. On the other hand, there is much to be said for a litigant's right to the judgment of the court which he invokes and for the view that the scope of the conclusions and decrees of sister federal courts, however complicated may be the litigation out of which they arose, may well be determined by an objective evaluation of what has been recorded in opinion and decree rather than by a subjective interpretation which may include in retrospect what was locked in the breast of the original judge.

In the circumstances which prevail in this case, however, we need not determine this interesting question.[19] United did not apply for certification of the questions relat-

19. See United States Gypsum Co. v. National Gypsum Co., 352 U.S. 457 (1957); see also Levin, Inter-Jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism, 111 U. Pa. L. Rev. 344 (1963).

ing to the meaning and effect of the Government decree during the lengthy trial in the court below. It did not even do so immediately after the opinion was filed in the district court on April 28, 1965. Instead, on May 21, 1965, United applied to Judge Wyzanski in the District Court in Massachusetts on notice to Hanover and the Government for construction or amendment of the Government decree. At a hearing on May 28, 1965 Judge Wyzanski declined to act on the ground of comity in view of the late stage of the case in the Middle District of Pennsylvania.

United contends with much force that Judge Wyzanski plainly indicated at the hearing his informal interpretation of the decree contrary to that of the court below. But whatever the parties may make of Judge Wyzanski's comments from the bench at that time, it was not until after the application was denied on May 28, 1965 that United, on June 9, 1965 in connection with its motion for a partial new trial applied for a certification by the court below to the District Court in Massachusetts of the questions relating to the effect of the Government decree.

We hold that in view of the untimeliness of the request for certification, its denial by the court below was not an abuse of discretion.

Statute of Limitations

The suit was filed before the effective date of the amendment of July 7, 1955 creating a federal four year statute of limitations in antitrust actions (15 U.S.C. § 15b). The parties are agreed that by virtue of the applicable Pennsylvania statute and various tolling provisions[20] the

20. See 245 F.Supp. at 294, n. 15.

six-year period under the statute was extended backward so as to bar claims for conduct prior to July 1, 1939.

The contention now made, however, is that if there was a refusal by United to sell shoe machinery to Hanover, the injury occurred many years prior to 1939, in fact perhaps even before the present century, and hence all recovery is barred by the statute of limitations. This contention falls in view of our holding that the duty to sell established by the Government decree did not come into existence until 1946. Since the injury could not have occurred prior to 1946, Hanover's claim is well within the period of the statute of limitations.

Damages

1. *The Damages Within the Allowable Period.*

The court below held that as a result of United's unlawful monopolization Hanover was required to pay more on the leases for the use of its shoe machinery than it would have been required to pay if the machinery had been available for sale in a free and competitive market. It held that as a result Hanover was damaged in the period from July 1, 1939 through September 21, 1955 in the amount of $1,413,203, which when trebled amounted to $4,239,609.

The damage period, as we have already seen, must be limited to commence on June 10, 1946. In the present state of the record it is not clear that the court below was justified in fixing the end of the damage period at the date of the institution of the action. Section 9 of the Government decree required United to present to the court before "B Day" a detailed plan for terminating all outstanding leases and for converting the lessees' rights to ownership

of the machines they then held. The plan was approved by Judge Wyzanski on June 1, 1955. The record shows that Hanover actually converted to ownership its previously leased machines sometimes in October, 1955.

In these circumstances, the damage period ended on June 1, 1955 for on that date the conversion from leasehold to ownership was available to Hanover and the unlawful lease-only policy had ended.

Accordingly, no damages may be allowed for the period between June 1, and September 21, 1955,[21] or, as we have already determined, for the period prior to June 10, 1946. Since there is no division in the record of the damages for either of these two periods, it will be necessary to award a new trial on the issue of damages so that the proof may be broken down to show what damages, if any, were sustained during the allowable period.

A number of problems in the proof of damages which have been presented to us will recur on retrial. To the extent that it is possible to adjudicate them on the present record, it is desirable that we do so as a guide to the court below on the retrial.

2. *Cost of Capital.*

United contends that Hanover's so-called cost of capital should have been treated as an element of the cost of acquiring the machinery. The court below disallowed this item, which was defined as "the rate of return expected by investors on capital funds they place at . . . [a concern's] disposal," after hearing the conflicting testimony of expert economists called by each party. It found that "cost of

21. Of course, the credit for salvage value should be computed as of that date.

capital" is an economic concept which allows a company to decide if a certain investment is sound by computing the rate of return which will be required on that investment to justify expending funds on it rather than in an alternative investment, and that it is measured in terms of percentage of earnings per share of common stock to price per share, and of percentage of net profits after taxes to stockholders' equity. It also found that the measurement of cost of capital was vague and not susceptible of general agreement in its application and that in any event it was not a proper element in the calculation of damages but was only a guide to investment.

The novel concept which United sought to have approved has not yet reached the point of general acceptance even among economists. We agree with the court below that cost of capital is not sufficiently related to actual costs to be included in an antitrust damage calculation.

3. *Tax Benefits.*

The court below held that whatever tax advantages Hanover obtained by the leasing system could not be considered in reduction of the amount of Hanover's recovery. It did so on the grounds that generally in tort and breach of contract actions taxes are not considered in assessing damages[22] and that any recovery by Hanover would be subject to taxation. It relied upon Judge Goodrich's statement in the passing-on trial that whatever happens after the injury which permits an injured plaintiff to escape some of the consequences of the wrong done him does not inure to the benefit of the defendant.[23] It therefore held

22. Citing annotations in 63 ALR 2d 1393 and 1433.

23. 185 F.Supp. at 829.

that tax consequences to Hanover such as deductions for rents and royalties of lease machines and capital gains treatment for machines if owned and later sold were extraneous and were not to be considered.

In this we think the court below erred. What is involved here is not the tax on Hanover's recovery but rather the tax elements which would bear on Hanover's choice of purchasing rather than leasing the machinery it required. In making such a determination a business of any size necessarily must give consideration to the tax elements inherent in the two alternatives from which the choice must be made. It therefore was significant in determining whether Hanover, if it had been able to do so, would have purchased the machinery which it leased from United, to evaluate the respective tax consequences of purchase and of lease and their financial impact. Since these tax consequences are so inherently a part of the choice which would be made and since the court below has found that Hanover would have chosen to buy rather than lease the machinery, the award of damages should not exceed the difference between the two alternatives as Hanover itself would have computed it. The excess of one over the other of the two alternatives of purchase or lease should not be artificially inflated by ignoring the impact of taxation. We deal here not with subsequent tax effect on damages inflicted, but rather with damages resulting from the choice of one over another course of action in both of which the tax impact necessarily was a matter of contemporaneous consideration and significance. This is as realistic an element as the deduction which the court below required in order to reflect the fact that United serviced its machines as lessor, a duty which Hanover itself would have had to assume and pay

for if it had been the owner of the machines.[24] In the same way, if Hanover had owned rather than leased the machines it would not have had the benefit of tax deductions for the rental and royalty payments to United and would have been subject to capital gains tax on the sale of any machines it sold at more than depreciated book value. It would be a distortion of reality to permit Hanover to recover damages on the ground that it would have bought machinery if it had been allowed to do so, without requiring it to give credit in its calculation of its damages for the savings which accrued to it from the tax advantages it received under the leasing system it now disowns and without also requiring it to reflect in its costs of ownership the taxes which such dominion would have imposed.

Hanover's damages therefore must be diminished by permitting United to show the favorable tax consequences which Hanover obtained from leasing and the unfavorable consequences which would have flowed from ownership of the machinery. We do no more than require accuracy in the calculation of the relative financial cost of leasing compared to buying the machinery, which must include those elements which a business corporation would necessarily consider in choosing between the two alternatives.

Hanover's Cross-Appeal

Hanover in its cross-appeal attacks the district court's exclusion from its recoverable damages of those damages attributable to the unavailability of the United Goodyear Outsole Rapid Lockstitch Machine ("ORL") for the period 1939-1955, which it claimed amounted to $324,356.[25]

24. See 245 F.Supp. at 287.

25. See 245 F.Supp. at 299, 302.

The court below excluded the item on the ground that another manufacturer's equipment, known as the Landis Stitcher, was available to Hanover and would have been satisfactory for its operations.[26] Hanover maintains that there is no evidence to support the conclusion that the Landis Stitcher was a satisfactory substitute for the ORL. It therefore seeks to have its damage judgment increased by threefold the amount of $324,356.

Even if Hanover's contention is correct, the present record does not permit an award of damages for this item. For the amount of $324,356 stretches over the period from 1939 to 1955 and we cannot allocate it within the allowable period beginning June 10, 1946 and ending June 1, 1955. This issue therefore must be remitted to the court below for reconsideration as part of the retrial on damages. When evidence has been taken on this question on retrial the record may well be different from what is now before us. In these circumstances, therefore, we shall not pass on the sufficiency of the present record to justify the conclusion that the Landis Stitcher could be used satisfactorily in Hanover's welt shoe manufacturing as a substitute for the ORL machine.

26. 245 F.Supp. at 283.

Counsel Fees

The court below allowed to Hanover an attorneys' fee of $600,000 for the services of New York counsel and $50,000 for the services of Pennsylvania counsel. United objects that the allowances are excessive.

The district court tested the reasonableness of the fees, especially to New York counsel, not only by the hours devoted to the case, but also by the percentage of the recovery in its original and trebled amounts. See 245 F.Supp. at 303-4. Since the period for which damages may be awarded is now being reduced and a retrial will be held on damages, it will be for the court below to determine the reasonable fees which should be made to counsel in the light of whatever new award it may make on damages.

We will therefore vacate the award of counsel fees and order counsel fees to be redetermined in the light of whatever damages the court may find on the rehearing.

Conclusion

In United's appeal (Appeal No. 15626) the judgment of the court below will be vacated as to damages and a new trial will be awarded limited to damages, in accordance with this opinion; and the award of counsel fees in the amount of $600,000 for the services of Donovan Leisure Newton & Irvine and $50,000 for the services of Nogi, O'Malley & Harris will be vacated for further proceedings in accordance with this opinion.

In Hanover's appeal (Appeal No. 15627) the judgment will be vacated so that the issue therein raised may be reconsidered as part of the retrial of damages.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Supplemental Opinion of the Court

(Filed May 18, 1967)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 15626

THE HANOVER SHOE, INC.,

v.

UNITED SHOE MACHINERY CORPORATION,

Appellant.

No. 15627

THE HANOVER SHOE, INC.,

Appellant,

v.

UNITED SHOE MACHINERY CORPORATION.

Before: FORMAN, GANEY and FREEDMAN, *Circuit Judges*

FREEDMAN, *Circuit Judge:*

Only one argument made in the petitions for rehearing calls for further comment. United argues in its petition, as it did before us, that the statute of limitations completely bars Hanover's claim for damages. Both parties had conceded at trial that the applicable six-year Pennsylvania statute of limitations had been extended backward by various tolling provisions to allow recovery of all damages incurred after 1939. We reduced the period of allowable

damages to one beginning in 1946, when the *American Tobacco* case was decided, and we did not reach United's contention regarding the statute of limitations, because we reasoned that since United's conduct did not become illegal until 1946, Hanover's cause of action for damages could not have arisen any earlier.

United now argues that the statute of limitations began to run in 1912 or even earlier, when it first refused to sell its machinery, and that the statute was not tolled simply because the conduct which caused the injury was legal under the precedents of that time.[1] This, however, does not require a different result in this case, for United has misconceived the basic nature of Hanover's claim for damages.

United argues that where a refusal to deal causing damages has occurred well before the allowable period under the statute of limitations, no recovery may be had, even for damages following the reiteration of such a refusal to deal within the statutory period.[2] The cases relied on,

1. For this United cites Marreo Morales v. Bull Steamship Co., 279 F.2d 299 (1 Cir. 1960); Versluis v. Town of Haskell, 154 F.2d 935 (10 Cir. 1946).

2. For this United cites Garelick v. Goerlich's, Inc., 323 F.2d 854 (6 Cir. 1963); Peto v. Madison Square Garden Corp., 1965 Trade Cases ¶ 71,398 (S.D.N.Y. 1965); Sherman v. Goerlich's Inc., 238 F.Supp. 728 (E.D.Mich. 1963), aff'd, 341 F.2d 988 (6 Cir. 1965), cert. denied, 382 U.S. 830 (1965); Norman Tobacco & Candy Co., Inc. v. Gillette Safety Razor Co., 197 F.Supp. 333 (N.D.Ala. 1960), aff'd, 295 F.2d 362 (5 Cir. 1961); Emich Motors Corp. v. General Motors Corp., 1955 Trade Cases ¶ 67,960 (N.D.Ill. 1955), aff'd, 229 F.2d 714 (7 Cir. 1956). See also Steiner v. 20th Century-Fox Film Corp., 232 F.2d 190 (9 Cir. 1956); The Campbell Distributing Co. v. Jos. Schlitz Brewing Co., 208 F.Supp. 523 (D.Md. 1962); Gaetzi v. Carling Brewing Co., 205 F.Supp. 615 (E.D.Mich. 1962); Farbenfabriken Bayer, A.G. v. Sterling Drug, Inc., 153 F.Supp. 589 (D.N.J. 1957), aff'd, 307 F.2d 210 (3 Cir. 1962), cert. denied, 372 U.S. 929 (1963).

however, are very different from the present case. First, they are antitrust conspiracy cases in which the plaintiff sought to recover damages for the full period both within and outside the statute of limitations, on the claim that the statute did not begin to run until the termination of the conspiracy. Here, however, Hanover does not seek to recover the damages it suffered before 1939; it concedes that any claims it had for conduct in that period are now barred and seeks only to recover for damages inflicted after 1939. Secondly, on the facts in the cases cited by United it would have been difficult to segregate damages which flowed from the original refusal to deal from damages attributable to the continued refusals within the statutory period. On the other hand, the specific collection of rentals every month within the statutory period provides a concrete standard for the measurement of the damages which occurred here within the statutory period by comparing the rentals with the reasonable sales value of the machinery.[3] Finally, in the cited cases the continuing conduct was that of a mere re-assertion of the refusal to deal. Here, however, United went beyond a mere continuation of the refusal to sell; it collected rentals on leases and entered into new leases when old machinery was no longer in working condition and required replacement.

The rule applicable to the facts in this case is that where the repeated and measurable invasion of a plaintiff's rights occurs both outside the statutory period and also within it, the fact that some of the injury and damage occurred outside the statutory period does not affect the

3. The Muskin Shoe Co. v. United Shoe Machinery Corp., 167 F.Supp. 106 (D.Md. 1958), which found a similar measure too complex, was specifically rejected by Chief Judge Sheridan, and we agree that it should not be followed. See 245 F.Supp. at 295-96.

plaintiff's right to recover for the separate invasion of its rights which occurred within the period.[4] Indeed, any other rule would be an affront to reason, for it would require the conclusion that injury and damages which were inflicted, as in this case, in 1955, by concrete and specific business transactions, were barred by the statute of limitations as long ago as 1918 or even earlier, because of similar but not identical conduct. The policy of the statute of limitations is maintained by allowing recovery for measurable injury within the period and barring recovery for injury beyond it. The operative facts underlying Hanover's claim occurred within the statutory period as tolled, and the traditional concern regarding lost witnesses and fading memories is thus fully satisfied. Moreover, we effectuate the general policy against stale claims in barring injury suffered before 1946. In so doing, however, we see no need to wipe out Hanover's current claim.[5]

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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4. Highland Supply Corp. v. Reynolds Metals Co., 327 F.2d 725 (8 Cir. 1964); Roosevelt Raceway, Inc. v. Universal Controls, Inc., 1965 Trade Cases ¶ 71,565 (E.D.N.Y. 1965); Susser v. Carvel Corp., 206 F.Supp. 636 (S.D.N.Y. 1962), aff'd 332 F.2d 505 (2 Cir. 1964), cert. dismissed, 381 U.S. 125 (1965); Cardinal Films, Inc. v. Republic Pictures Corp., 148 F.Supp. 156 (S.D.N.Y. 1957).

5. See Daniels v. The Beryllium Corp., 227 F.Supp. 591 (E.D.Pa. 1964) and 211 F. Supp. 452 (E.D.Pa. 1962), where recovery was permitted for the aggravation of an illness during the statutory period, although relief for the original injury was held barred by the statute of limitations.

Order Amending Judgment and Amended Judgment

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 15626

THE HANOVER SHOE, INC.

v.

UNITED SHOE MACHINERY CORPORATION,

Appellant

No. 15627

THE HANOVER SHOE, INC.

Appellant,

v.

UNITED SHOE MACHINERY CORPORATION,

Present: Forman, Ganey and Freedman, *Circuit Judges*

ORDER AMENDING JUDGMENT

The judgment in these appeals is hereby amended by striking out the award of costs to each appellant and by providing in lieu thereof that in each appeal the amount of attorneys fees in the prosecution, briefing and arguing of

the appeal shall be determined by the district court as part of the retrial of the issue of damages, and that the costs on this appeal shall abide the ultimate decision in this action.

By the Court,

ABRAHAM L. FREEDMAN

.....

Circuit Judge

Date: June 7, 1967

Order Amending Judgment and Amended Judgment

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 15626

THE HANOVER SHOE, INC.

v.

UNITED SHOE MACHINERY CORPORATION,

Appellant

No. 15627

THE HANOVER SHOE, INC.

Appellant,

v.

UNITED SHOE MACHINERY CORPORATION

(D. C. Civil No. 5395)

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present—FOREMAN, GANEY and FREEDMAN, *Circuit Judges.*

AMENDED JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that in United's appeal (No. 15,626) the judgment of the District Court, filed August 13, 1965,

be, and the same is hereby vacated as to damages and a new trial is awarded limited to damages, in accordance with the opinion of this Court; and the award of counsel fees in the amount of $600,000 for the services of Donovan Leisure Newton & Irvine and $50,000 for the services of Nogi, O'Malley & Harris be and hereby is vacated for further proceedings in accordance with the opinion of this Court; in Hanover's appeal (No. 15,627) the judgment of the District Court, filed August 13, 1965, be, and the same is hereby vacated so that the issue therein raised may be reconsidered as part of the retrial of damages. The amount of attorneys fees in the prosecution, briefing and argument of each of these appeals shall be determined by the District Court as part of the retrial of the issue of damages, and the costs on these appeals shall abide the ultimate decision in this action.

ATTEST:

THOMAS F. QUINN
Clerk

June 7, 1967

APPENDIX B

Order Denying Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 15626

THE HANOVER SHOE, INC.

v.

UNITED SHOE MACHINERY CORPORATION,

Appellant

No. 15627

THE HANOVER SHOE, INC.

Appellant,

v.

UNITED SHOE MACHINERY CORPORATION

SUR PETITION FOR REHEARING

Present—Staley, Chief Judge, McLaughlin, Kalodner, Hastie, Forman, Ganey, Smith, Freedman and Seitz, Circuit Judges.

The petitions for rehearing filed by The Hanover Shoe, Inc. and United Shoe Machinery Corporation in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision

having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petitions for rehearing are denied.

By the Court,
ABRAHAM L. FREEDMAN

.....
Judge

Dated: May 18, 1967

Order

SUPREME COURT OF THE UNITED STATES

No. 335, October Term, 1967

THE HANOVER SHOE, INC.,
Petitioner,

v.

UNITED SHOE MACHINERY CORPORATION

ORDER ALLOWING CERTIORARI. Filed October 9, 1967

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is consolidated with No. 463 and two hours are allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Marshall took no part in the consideration or decision of this petition.

Order

SUPREME COURT OF THE UNITED STATES

No. 463, October Term, 1967

UNITED SHOE MACHINERY CORPORATION,
Petitioner,

v.

THE HANOVER SHOE, INC.

ORDER ALLOWING CERTIORARI. Filed October 9, 1967

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is consolidated with No. 335 and two hours are allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Marshall took no part in the consideration or decision of this petition.

Complaint

IN THE

DISTRICT COURT OF THE UNIED STATES

FOR THE DISTRICT OF MASSACHUSETTS

Civil No. 7198

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED SHOE MACHINERY CORPORATION, DEFENDANT

The United States of America by its attorneys, acting under the direction of the Attorney General of the United States, brings this action against the United Shoe Machinery Corporation and complains and alleges, on information and belief, as follows:

* * * * *

OFFENSES CHARGED

* * * * *

C. THE PURSUIT BY UNITED OF A MANUFACTURING AND MARKETING POLICY DESIGNED TO RESTRICT AND ELIMINATE COMPETITION.

* * * * *

1. United's leasing policy

61. For many years United has declined to sell most of its shoe machines and has made such machines available to shoe manufacturers only upon leases which reserve to United the sole and exclusive property in the machines and which grant to lessees the right to use the machines only for the purposes specified in the leases. United

offers certain of its machines upon lease or sale terms at the option of shoe manufacturers but has followed the practice of establishing such alternative terms of sale and lease as will cause shoe manufacturers to lease such machines. As a consequence, most machines offered by United on optional terms are leased by shoe manufacturers.

62. At present United offers on lease only all of its major machines, except sole cutting and certain leveling machines; all minor machines handled, with a few unimportant exceptions, by its Lasting-Heeling, Goodyear, Littleway, and Cement Shoe departments; and various minor machines handled by its other departments. It offers on sale and not on lease a limited number of unimportant shoe machines handled, principally, by its General Department. All other shoe machines are offered on optional lease or sale terms. As a consequence of the foregoing, of the 123,000 United machines in shoe factories today only 21,000, or approximately 18%, are owned by shoe manufacturers.

* * * * *

Prayer

Wherefore, the plaintiff prays:

* * * * *

7. That the defendant be required to offer to sell at reasonable prices all shoe machinery manufactured and commercialized by it and be enjoined from leasing shoe machinery except upon terms and conditions approved by the Court.

* * * * *

15. That the plaintiff have such other further and general relief as may be just and proper.

16. That the plaintiff recover the costs of this suit.

GRANT W. KELLEHER,
Special Assistant to the Attorney General.

C. WORTH ROWLEY,
ALFRED KARSTED,
EDWARD M. FEENEY,
ROY N. FREED,
Special Attorneys.

TOM C. CLARK,
Attorney General.

JOHN F. SONNETT,
Assistant Attorney General.

HOLMES BALDRIDGE,
Special Assistant to the Attorney General.

WILLIAM T. MCCARTHY,
United States Attorney.

Final Decree

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,

v.

UNITED SHOE MACHINERY CORPORATION.
CIVIL ACTION No. 7198

FINAL DECREE, February 18, 1953, as modified by orders of the Court, July 12, 1954 and September 17, 1954.

This cause having come on to be heard, and the Court having fully considered the evidence and arguments, and having filed its Findings of Fact, and Opinions on Violation and Remedy, it is hereby

ORDERED, ADJUDGED, AND DECREED that:

1. As used in this Decree:

"A Day" means January 1, 1955.

"B Day" means April 1, 1955.

"C Day" means January 1, 1965.

"Shoe Machinery" means all types of shoe machinery distributed to shoe factories for use in the manufacture or repair of footwear, except dry thread sewing machines.

The words "machine type," "machines" and "machine" as used in this Decree mean "shoe machinery" as defined herein.

The word "supplies" as used in this Decree means all products, when distributed by defendant for use or consumption by shoe factories, of the types heretofore classified by the defendant as sales merchandise.

The word "patent" as used in this Decree means a United States patent for an invention relating to the manufacture, use or sale of footwear, shoe machinery or supplies.

2. Defendant violated § 2 of the Sherman Act, 15 U.S.C. § 2, by monopolizing the shoe machinery trade and commerce among the several States. Defendant violated the same section of the law by monopolizing that part of the interstate trade and commerce in tacks, nails and eyelets, which is concerned with supplying the demand for those products by shoe factories within the United States. The other charges of violation of the Sherman Act set forth in the complaint are dismissed with prejudice. No obligation of the Defendant under this Decree shall apply to its manufacturing, distribution, service, patent or other activities in any industry other than shoe machinery and supplies or in relation to any industry other than the shoe manufacturing industry.

3. Defendant, its subsidiaries, and each of their directors, officers, agents, and employees, and all persons acting for them, are hereby enjoined and restrained from further monopolizing those parts of the trade or commerce among the several States which have been referred to in the previous paragraph.

4. All leases made by defendant which include either a ten-year term, or a full capacity clause, or deferred payment charges, and all leases under which during the life of the leases defendant has rendered repair and other service without making them subject to separate, segregated charges, are declared to have been means whereby defendant monopolized the shoe machinery market.

5. After A Day, defendant shall not offer for lease any machine type, unless it also offers such type for sale. Defendant, if it offers any machine type for lease, shall set such terms for leasing that machine as do not make it substantially more advantageous for a shoe factory to lease rather than to buy a machine. Defendant shall not be required to secure advance judicial approval of the financial terms in sales or lease contracts. But if any lease or contract substantially discriminates in favor of leasing, plaintiff may apply to this Court for further specific relief.

6. Before A Day, defendant, if it desires to continue to lease any shoe machinery, shall file in this Court a standard form of lease that meets the following directions. Other standard forms of lease shall be filed in this Court by defendant promptly as they are printed and before defendant places them in use.

a. The maximum term for either an original or renewal lease shall be five years.

b. Provision shall be made that a lessee shall have the right to return the leased machine at any time after one year, on paying all rentals already accrued, the shipping charges, the cost of broken

and missing parts, and in addition, no more than the equivalent of the monthly (not the unit) payments which would have been due had the lessee kept the machine for an additional three months. The lease may provide for return on terms more favorable to the lessee if the return is due exclusively to defects in the machine, or customer dissatisfaction after a trial period, or customer abandonment of operations. But no return charge shall discriminate on account of the substitution of a competitive machine.

c. The new forms of lease shall not include any return of deferred payment charges other than those specified in the previous paragraph. But they may include provisions for initial charges and deposits.

d. Defendant may, if it sees fit, use a unit charge in addition to, or as an alternative to, monthly rental charges. But such unit charges shall have no minimum.

e. After A Day, defendant shall not include within any lease, whether unit charges are used or not, a full capacity clause, or any equivalent.

f. After A Day, defendant shall not include either in the terms of, or the application of, any lease any plan similar to the right of deduction fund which it has heretofore established, or the 1935 Plan which it adopted for lessees desiring to return machinery.

g. Defendant shall not be obliged to present to the Court a statement of what will be the amount of, or method of calculating, its rentals, its charges, deposits, or like financial terms. But, after A Day,

in preparing, executing, or applying its leases, defendant shall not discriminate between customers of the same general class, except that defendant may make different deposit provisions for different persons, upon an individual basis.

h. Defendant may propose various uniform lease riders to provide for peak-load or trial installations. Defendant may also use various loan forms to cover installation of experimental or other machines for which commercial terms have not been adopted. All such riders and forms shall comply with the preceding paragraphs.

i. Each lease shall expressly state what services and privileges it covers. After A Day, defendant may render, without separate charges, instruction services, installation services, repair services, or other services, during a period of 30 days, exclusive of Saturdays, Sundays and holidays, after the machine has been first installed and set up in line for use in shoe manufacture. After such 30-day period, defendant shall not provide any such services for a machine covered by a lease, except during the first 60 days, exclusive of Saturdays, Sundays and holidays, of a trial installation period covered by a lease trial rider as above provided, other than upon the basis of separate and reasonable charges for the services rendered, and the permission to render service for machines covered by lease trial riders herein contained shall be subject to the condition that similar service is made available for trial installations of machines whether to be leased or to be sold.

j. Defendant shall not vary the substance of the forms of lease submitted to the Court, without the Court's approval, but defendant may, without submitting them to the Court, use such special forms of lease or loan agreements as may be appropriate to the requirements of Federal, State or local governmental agencies and of educational institutions not engaged in the manufacture of footwear for profit. This provision shall not be interpreted as requiring defendant to secure advance judicial approval of the dollars and cents figures used in setting monthly rental charges, unit charges, deposits, or other specifically fiscal aspects of the lease.

7. Except for good cause, defendant shall not after A Day refuse a prospective customer's request to lease or buy a machine, of a type which defendant is at the time of such request offering for commercial lease or sale. In the event that a prospective customer is refused the privilege of buying or leasing a machine, he shall have the right to intervene in this case in this Court to have his controversy adjudicated, and in such proceedings, defendant shall have the burden of proving that there is good cause for refusing to make the sale or lease.

8. Before A Day, defendant shall present to the Court, if it desires to continue to render repair and other services, a tariff of the charges which it proposes to apply for rendering service. This service tariff shall have uniform charges for leased and sold machines. It may take into account travel time as well as time used in making repairs or rendering other services. It may recognize any economy defendant actually realizes in its business on a

quantity basis, or any other economies in servicing customers of a particular type, or customers who commit themselves for particular periods of time, in any event, however, not exceeding twelve months at a time. Neither the tariff nor this Decree shall be interpreted as requiring defendant to render services in connection with machines, or parts, not of its manufacture. The tariff shall provide that parts shall be made available on the same terms to customers receiving services, customers not receiving services, and any other person; provided, however, that defendant shall not be obliged to furnish parts to a customer to help him construct an entire new machine out of assembled parts.

9. Before B Day, defendant, after conferring with plaintiff, with representatives of The National Shoe Manufacturers Association, and with any lessees who previous to B Day have intervened in these proceedings, shall present to the Court a detailed plan for terminating all outstanding leases. This plan shall make appropriate non-discriminatory financial provisions for defendant's rights and each lessee's rights in connection with the termination of existing leases. It shall also make non-discriminatory provisions under which, within a reasonable period of time, lessees under leases existing before B Day may buy or lease those machines which have been installed. Such provisions shall be at least as favorable to shoe factories as the provisions in the new lease and sale forms.

10. Before B Day, defendant shall submit a plan for disposing of such parts of its business and the business of its subsidiaries as are concerned with the manufacture or distribution of tacks, nails and eyelets.

11. Beginning three years after A Day, defendant shall not distribute any supplies not manufactured by itself or a corporation in which it owns at least 20% of the Common Stock, provided that this shall not apply to supplies acquired by United before then.

12. Defendant shall grant to any applicant, except a deliberate infringer, a non-exclusive license under any or all patents now held by defendant on reasonable non-discriminatory royalty terms. Such licenses may, however, be limited to the manufacture, use, and sale of shoe machinery, shoe supplies, and like products used in shoe factories. Such licenses may contain a provision for the inspection of the records of the licensee by an independent auditor who shall report to the licensor only the amount of royalty due and payable and no other information. Such licenses shall contain a provision for imparting in writing, at a reasonable charge by the licensor to the licensee, the methods and processes used by defendant as of the date of this Decree in its commercial practices under the patents licensed. This Court reserves jurisdiction to pass upon the reasonableness of any royalty or charge herein directed to be reasonable. Nothing in this paragraph applies to patents issued upon the basis of applications filed later than A Day, nor shall anything herein prohibit the defendant from making a bona fide sale or assignment from time to time of any patent held by it.

13. After A Day, defendant shall not acquire any patent or patent application except patents or patent applications acquired by reason of bona fide employment of the inventor by it or by a subsidiary unless defendant files

in this Court an agreement to license that patent or patent application as provided in the previous paragraph with respect to patents it now owns.

14. After A Day, defendant shall not acquire any exclusive license under any patent unless such exclusive license grants defendant the right to license others and defendant promptly files in this Court an agreement to license as provided in Paragraph 12 of this Decree.

15. After A Day, defendant shall not acquire any shoe machinery business, any business manufacturing or distributing supplies for shoe factories, or any part thereof, or any stock therein, if the transaction involves more than $10,000 or its equivalent.

16. After A Day, defendant shall not buy or acquire any second-hand shoe machinery manufactured by it or any other person except for experimental or like purposes. The total acquisitions under this paragraph in any one year shall not represent an expenditure of more than $25,000, or its equivalent. Nothing in this paragraph shall be construed to apply to such rights as defendant may have to repossess, or to acquire at public auction, machines which it has conditionally sold and which the purchaser has lost the right to retain.

17. After A Day, defendant shall not continue any plan for quantity discounts in connection with any of its supplies, unless such discount system complies with all applicable laws.

18. On C Day, both parties shall report to this Court the effect of this decree, and may then petition for its modification, in view of its effect in establishing workable

competition. If either party takes advantage of this paragraph by filing a petition, each such petition shall be accompanied by affidavits setting forth the then structure of the shoe machinery market and defendant's power within that market.

19. Defendant shall pay the costs of this case.

20. On or before October 1, 1954, defendant shall send to each of its then lessees a written copy of this Decree as modified prior to the date of mailing.

21. Nothing in this Decree shall impose any obligation on defendant until three months before A Day.

22. Nothing in this Decree shall impose any obligation on defendant or its subsidiaries to do or omit any action outside the United States.

23. Jurisdiction of this cause is retained for the purpose of enabling either of the parties to apply to this Court at any time for such further orders and directions as may be appropriate for the correction, construction, or carrying out of this Decree, and to set aside the Decree and take further proceedings if future developments justify that course in the appropriate enforcement of the Anti-Trust Act.

Stipulation of Facts

(Court Reporter's Note: As directed by the Court at page 50 and 51 of this Transcript, the following contains the paragraphs of the stipulation dated March 22, 1957 offered by plaintiff and defendant. The paragraphs are here copied in full though only part may have been offered, and where only part was offered, such part is indicated with appropriate reference to the Transcript page where the offer was made)

1. About 90% of the shoes manufactured by plaintiff have at all relevant times been distributed through and sold to the public by the Hanover Shoe Stores, owned and operated by Sheppard & Myers, Incorporated which is the wholly-owned subsidiary of plaintiff. The remainder of plaintiff's production has been sold at wholesale to J. C. Penney Co. Inc. (in 1953-55) or on a competitive bidding basis to the Armed Forces of the United States (in 1940-45 and 1951-55).

(Court Reporter's Note: The above paragraph was offered in full at page 49 of this Transcript by the plaintiff)

Stipulation of Facts

Presently, the officers and directors of plaintiff and its wholly owned subsidiary, Sheppard & Myers, Incorporated, include

	The Hanover Shoe, Inc.	Sheppard & Myers, Incorporated
Chairman	Robert M. Laird	Lawrence B. Sheppard
President	Lawrence B. Sheppard	Archie C. Mudge
Vice President	Archie C. Mudge	Robert M. Laird
Treasurer	Robert M. Laird	

• • • • •

7. On a combined basis plaintiff and its predecessors have realized an operating profit in each of their first 55 years of operation (1900-1955) except for 1932 and 1933 (Def. Ex. 1 for Id.). On a combined basis plaintiff and Sheppard & Myers, Incorporated have made profits since 1935 as follows: (inter-company dividends eliminated)

Combined Net Profit before Income Taxes and Combined Net Profit After Income Taxes

Year	Net Profit Before Income Taxes	Net Profit After Income Taxes
1935	$ 393,504	$ 323,662
1936	583,647	462,125
1937	565,236	457,843
1938	268,515	206,601
1939	445,418	352,748
1940	465,505	335,820
1941	958,403	505,680
1942	1,489,599	495,974
1943	1,371,583	442,474
1944	1,277,524	403,217
1945	1,538,976	448,481
1946	1,644,024	983,638
1947	3,059,373	1,827,389
1948	3,035,053	1,819,698
1949	2,554,343	1,528,501
1950	3,161,581	1,701,160
1951	2,402,591	1,147,690
1952	2,511,940	1,168,424
1953	2,507,302	1,200,901
1954	2,455,607	1,117,001
1955	2,963,232	1,386,854

(Court Reporter's Note: Defendant offered this paragraph in full at page 150 of the Transcript)

* * * * *

10. The procedure employed by plaintiff at all relevant times in determining the inventory value of shoes manufactured by it has been as follows:

In plaintiff's inventories of finished shoes and shoes in process, taken usually twice a year (July 1 and November 30 or December 31) the value placed on all materials used in making shoes is calculated at cost or market price, whichever is lower, at the inventory date; total wages paid during the period are calculated; the total overhead is also calculated, and included among some 20 items of Manufacturing Expenses, are the amounts for all charges paid by plaintiff during the period for the lease, use, maintenance and transportation of shoe machinery; and the amounts so arrived at are applied to the various styles of shoes produced, both to finished shoes and to shoes in process. The total inventory values per pair by style, determined in accordance with the foregoing steps at the end of each inventory period, have at all relevant times been less than the price per pair at which shoes are billed by plaintiff to its wholly-owned subsidiary, Sheppard & Myers, Incorporated, and less than the retail price of such shoes when offered for sale and sold by Sheppard & Myers, Incorporated; and the total of retail prices received by Sheppard & Myers, Incorporated, and the total of billing prices received by plaintiff from Sheppard & Myers, Incorporated, have each in each calendar year exceeded the final inventory value figures determined as above described. The price of shoes manufactured by plaintiff and sold by it to J. C. Penney Co., Inc. and to the United States Armed Forces have at all times been in excess of the inventory value figure determined for such shoes by plaintiff in substantially the same manner as above described. The foregoing with the records described in paragraphs 12 and 13 and with other subsidiary records

are the only records maintained by plaintiff reflecting its costs of manufacturing shoes.

(Court Reporter's Note: This paragraph was offered in full by the defendant at page 150 of the Transcript)

* * * * *

16. The royalty and rental cost per pair of shoes manufactured and sold by plaintiff for the use of all shoe machines leased by it from defendant since 1935 has been as follows:

Year	Cost of Royalties & Rentals Paid to U. S. M. C. Only	Pairs Shoes Mfd. by T. H. S. Inc.	Royalty & Rental Cost Per Pair	Increase or Decrease
1935	$ 72,150.39(1)	791,213	$.0912(1)	
1936	88,136.27(1)	983,444	.0896(1)	$−.0016
1937	87,504.15	1,022,135	.0856	−.0040
1938	77,314.20	878,777	.0880	+.0024
1939	85,636.50	1,006,768	.0851	−.0029
1940	90,585.47	1,076,265	.0842	−.0009
1941	136,839.30	1,674,174	.0817	−.0025
1942	156,777.28	1,929,277	.0813	−.0004
1943	153,604.77	1,915,143	.0802	−.0011
1944	149,309.85	1,938,289	.0770	−.0032
1945	145,206.32	1,870,290	.0776	+.0006
1946	142,438.50	1,800,172	.0791	+.0015
1947	149,692.42	1,831,546	.0817	+.0026
1948	155,398.87	1,745,269	.0890	+.0073
1949	171,894.90	1,780,823	.0965	+.0075
1950	184,853.23	1,790,277	.1033	+.0068
1951	215,768.37	1,918,842	.1124	+.0091
1952	198,893.75	1,665,508	.1194	+.0070
1953	188,383.95	1,547,197	.1218	+.0024
1954	174,369.46	1,418,136	.1230	+.0012
1955	121,638.49	1,515,248	.0803	−.0427

Note (1) The Royalties and Rentals paid represents all payments made by The Hanover Shoe, Inc. to U. S. M. C. and to others for the leasing of machinery. No invoices are available in the files of The Hanover Shoe, Inc. prior to 1937 to determine the breakdown showing the amount paid to U. S. M. C. only. From 1937 thru 1955 payments shown were made to U. S. M. C. only.

The rate of rental, minimum charge, and unit charge (royalty) paid by plaintiff under leases from defendant of shoe machines of all the types utilized by plaintiff has since 1935 been uniform except for (a) a restoration by defendant effective December 1, 1946 of unit charge rates on the USMC Staple Side Lasting Machine, Model B to .006¢ per pair, previously reduced by defendant effective January 1, 1939 to .005¢ per pair and (b) two increases put into effect by defendant applicable only to leases of new machinery or renewals of outstanding leases executed after the effective date of the increases; one such increase was effective May 1, 1947 and the other July 31, 1950. Each of the approximately 300 shoe manufacturing machines outstanding on lease by plaintiff from defendant at the time of the effective date of each of the foregoing two increases had either a ten-year term, or, in some cases, a five-year (renewal) term so that leases were expiring at various dates from less than one and up to ten years following the effective dates of these increases. The increased rates were payable and were paid by plaintiff only under renewal leases made following expiration of old outstanding leases or under leases on new machinery taken out after the effective date of said increases.

(Court Reporter's Note: This paragraph was offered in full by plaintiff at page 50 of the Transcript)

* * * * *

18. In the United States active competition has at all relevant times prevailed in the sale of men's dress and other shoes to the public at retail. In the distribution and sale of its men's dress and other shoes The Hanover Shoe, Inc. (through its subsidiary Sheppard & Myers,

Incorporated) competes principally at the retail level although, occasionally it has sold some shoes to J. C. Penney Co., Inc. and to the Armed Forces. Men's shoes sold to the public in retail competition in the United States are in the majority of instances sold in well-defined price brackets such as $4.95, $5.95, $6.95, $7.95, $8.95, $9.95 and so forth. In the case of a few retailers (including The Hanover Shoe, Inc. through its subsidiary Sheppard & Myers, Incorporated) men's shoes are sometimes sold at a price halfway between such as $4.50, $5.50, $6.50, $7.45, $8.45 and so on. The prices at which Hanover shoes have been sold at retail since January 1937 are shown in paragraph 14, above. Certain retailers, such as A. S. Beck (Shoe Corporation of America) and Sears Roebuck on occasions price their men's shoes at $8.99, $9.99, $10.99 and so forth. Montgomery Ward in its Spring 1957 catalogue prices some men's dress shoes at $5.98 and the majority of its men's dress line from $7.95 to $15.95. Retailers selling men's dress shoes have generally increased or decreased prices by amounts of $1.00 or occasionally 50 cents; but during the years 1938 through 1940 and again during the years 1948 and 1949 the Thom McAn (Melville Shoe Corporation) shoes and the Flagg (General Shoe Corporation) shoes have been increased or decreased in retail prices by amounts of 10 cents, 15 cents or 20 cents a pair. The Hanover Shoe, Inc., through its wholly owned subsidiary, Sheppard & Myers, Incorporated, has priced its men's dress shoes and other shoes for sale at retail, at prices that would be in line with prices of its principal competitors which have at various times been and are Flagg Brothers (General Shoe Corporation), Diamond-A. S. Beck (Shoe Cor-

poration of America), Hardy (General Shoe Corporation), Thom McAn (Melville Shoe Corporation), Father & Son (Endicott Johnson Corporation), Worthmore (International Shoe Corporation), Douglas (General Shoe Corporation), Regal (Brown Shoe Company), Sears Roebuck, Montgomery Ward and J. C. Penney Co., Inc. The names in parentheses indicate the shoe manufacturing concerns, frequently parent corporations associated with the named retail organizations. These shoe manufacturing companies employed various shoe machines under leases from United Shoe Machinery Corporation in the same form as the leases between plaintiff and defendant, with the exception that in and after 1955 the various shoe manufacturing companies purchased machines from United Shoe Machinery Corporation in different proportions.

Order of Goodrich, J., Dated February 12, 1960 Denying Defendant's Motion to Dismiss Following Separate Trial [Opinion at 185 F. Supp. 826]

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 5395

[SAME TITLE]

Upon consideration of the briefs and arguments of counsel for the respective parties and in accordance with the opinion in this matter filed today, it is decreed and adjudged that the motion by the defendant to dismiss should be and hereby is denied and that the case is to be set down for trial unless the defendant timely files a motion under Section 1292(b) of the Judicial Code.

HERBERT F. GOODRICH

Circuit Judge specially assigned for the Middle District of Pennsylvania for this case.

February 12, 1960

Complaint

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

Civil Action File No. 6841

W. B. COON Co.,

Plaintiff,

vs

UNITED SHOE MACHINERY CORPORATION,

Defendant.

JURISDICTION

1. This action arises under Section 2 of the Act commonly known as the Sherman Act, 26 Stat. 209, U.S.C., Title 15, Sec. 2 and under Section 4 of the Act commonly known as the Clayton Act, 38 Stat. 731; U.S.C. Title 15, Section 15.

PARTIES

2. The plaintiff, W. B. Coon Co., is a corporation organized and existing under and by virtue of the laws of the State of New York, and has its principal office and place of business at Rochester, New York.

3. The defendant, United Shoe Machinery Corporation, hereinafter referred to as United, is a corporation organized and existing under the laws of the State of New Jersey, and has its principal office and place of business at 140 Federal Street, Boston, Massachusetts. The defendant also transacts business in the Western District of New York, having an office and place of business at

1461 Monroe Avenue, Rochester, New York, and may be found within said Western District.

THE PRODUCT AND COMMERCE INVOLVED

4. Since 1899 United or its predecessor has been continuously engaged in the manufacture and distribution of shoe machinery. The principal part of such shoe machinery is manufactured at United's factory at Beverley, Massachusetts, and is distributed in interstate commerce to shoe manufacturers, including the plaintiff. Shipments were made to W. B. Coon Co. at its principal factory at Rochester, New York, and at its other factories at Cuylerville, New York, and Geneseo, New York.

5. W. B. Coon Co. is now and, prior to 1899, has been engaged in the manufacture and sale of women's and juvenile shoes. Most of the operations of importance in the making of these shoes are done by machine and W. B. Coon Co. cannot engage competitively in quantity production of such shoes without such shoe machinery.

6. The operations involved in the manufacture of women's and juvenile shoes by W. B. Coon Co. and other shoe manufacturers are known as upper cutting, upper fitting, sole leather, lasting, bottoming, making, finishing and packing. These operations, briefly described below, are conducted in seven departments at the shoe factories of Rochester, as follows, and some or all of the United machine types listed in paragraphs 7 through 13 below have been used by W. B. Coon Co. since 1912.

7. *Cutting Department.* Upper cutting is done in this Department. This consists of cutting the various parts of the shoe upper and linings. The parts of the upper

(such as vamps, quarters, tips, stays, tongues and ornaments), are usually cut out from leather and fabric by clicking machines and clicking dies. In addition to the shoe uppers, the linings are also cut. Uppers and linings are matchmarked, sorted into pairs and stamped for size and case numbers, the latter being for factory identification throughout the remainder of the manufacturing process. The following United machines are used by W. B. Coon Co. in these operations:

Ideal Clicking Machine
Marking Machine, Model A
Marking Machine, Model B

8. *Fitting Department.* Upper fitting is done in this Department. This immediately follows the cutting operations. It includes a wide range of operations by means of which the separate parts of the upper and lining are prepared and assembled to make the completed shoe upper. The number and sequence of operations vary greatly and are in direct relation to the complexity of design and to the type of shoe being produced. If the shoes are eyeletted, a temporary thread lacing is inserted in the eyelet holes by a lacing machine. This is for the purpose of retaining the shoe shape during the subsequent operations. The following United machines are used by W. B. Coon Co. in these operations:

Duplex Eyeletting Machine
Eyeletting
Ensign lacing
Lacing
Skiving
Thermo cement fold
Rapid Folding

9. *Sole Leather Department.* Sole leather is the preparation of bottom stock for the shoe. The principal shoe parts prepared are outsoles, insoles and platforms (which are cushioned insoles) but they may also include counters, box toes, heels and welting. The operations largely involve cutting and shaping the materials used, and applying adhesives or stiffeners to the various parts. The following United machines are used by W. B. Coon Co. in these operations:

Economy Insole Lip Cementing
Economy Insole Channeling Machine
Insole Lip Cutting & Scoring Machine
Economy Insole Lipsetting
Summit Splitting Machines
Insole Rib Cementing, Model A
Insole Rib Reinforcing, Model B
Cementing
Sole Cementing
Apex Fleshing or Randing
Flexible Sole
Apex Welt Laying
Apex Feather Edge Shank Reduce
Shank Reducing
Outsole Roughing
Goodyear Insole Toe Snipping
Sole Splitting
Wiring
Pluma Skiving
Fibre Trimming
Unishank Moulding

10. *Lasting Department.* Lasting is the series of operations by means of which the shoe upper and lining are drawn tightly over the wood last on which the shoe is made, and fastened to the insole of the shoe. This operation causes the upper to conform to the shape of the last, imparting thereby the desired style and fit characteristic to the finished shoe. The work of lasting consists of positioning the insole, upper (including all lining materials), box toes and counters in correct relation to one another; in stretching the upper; and in fastening the entire structure together. The upper must be conformed to the last with a high degree of skill. The following United machines are used by W. B. Coon Co. in these operations:

Rex Assembling Machine
Celastic Conditioning Machine
Lasting Machine, No. 7
Heel Seat Lasting
Staple Sidelasting
Rex Pullover
Insole Tacking, No. 1
Insole Tacking, No. 3
Upper Trimming
Toe Lasting
Staple Fastening
Pasting
Goodyear Upper Staple Tack Pull
Cement Spraying Unit
Toe Trimming
Insole Heel Seat Trim

11. *Making Department.* Bottoming and making are done in this Department. Bottoming, includes a series of operations by means of which the shoe bottom is prepared and the outsole is permanently attached to the lasted upper of the shoe and it may include some operations upon the

outsole which are performed after attaching. Construction of the Goodyear Welt shoe requires that the welt be sewn on, the surplus upper material be removed (inseam trimming), the welt be beaten out flat and trimmed off and beveled at the heel breast line, and the outsole and welt be rough-rounded to approximately final shape. Some of the above operations apply to cement shoe construction. The final operation in bottoming generally is leveling, which is performed by machines which apply considerable pressure to the sole bottom either by means of a progressive roll or a matrix form. This operation compacts the shoe bottom and produces the desired smooth contours of the sole surface.

The following United machines are used by W. B. Coon Co. in these bottoming and making operations:

Goodyear Welt Beating & Slashing
Bottom Cementing
Goodyear Universal Rounding & Channeling Machine
Fibre Fastening Machine
Goodyear Sole Leveling
Goodyear Outsole Rapid Lockstitch
Loose Nailing No. 2
Inseam Trimming
Goodyear Rapid Bobbin winding
Universal Heat Activating
Goodyear Welt Butting & Tacking
Goodyear Welt Sewing
Solvent Applying
Sole Cement Applying
Sole Attaching Machine U.A.
Upper Trimming
Lasted Bottom Ironing
Goodyear Inseam Sewing
Goodyear Sole Laying

12. *Finishing Department.* Finishing is the giving of a thorough treatment to the entire shoe bottom surface to make it attractive in appearance and the heels are permanently attached. The bottom treatment consists of a variable combination of operations according to quality and effects desired and includes buffing and the application of different finishes. The following United machines are used by W. B. Coon Co. in these operations:

McKay Automatic Heel Loading & Attaching
Edge Setting and Wheeling
Naumkeag Buffing
Stitch & Upper Cleaner
Xpedite Finishing
Ultima Heel Trimming
Wood Heel Attaching
Heel Scouring

13. *Packing Department.* In the Packing Department operations are performed which gives shoes their final treatment before being packed in boxes. The following United machines are used by W. B. Coon Co. for these operations:

Embossing Machine
Wood Heel Nailing
Screw Remover
Boothco Trimming
Wood Heel Nailing

THE VIOLATION OF LAW COMPLAINED OF:

14. Prior to and continuously from the year 1912 the defendant, United Shoe Machinery Corporation, has been violating the antitrust laws of the United States, by:

(a) Monopolizing interstate trade and commerce in the shoe machinery industry of the United States;

(b) Monopolizing interstate trade and commerce of the United States in substantially all shoe machinery required and used by W. B. Coon Co. in the manufacture of women's and juvenile shoes.

15. Monopolization by United as aforesaid and the exercise by it of its monopoly powers has enabled United to dominate and control the market in the shoe machinery, to restrict actual competition and to exclude potential competition in said market.

THE PRINCIPAL MEANS USED TO ACCOMPLISH THE VIOLATION OF LAW:

16. At all times prior to May 17, 1954, the date of the decision of the United States Supreme Court affirming a judgment that United violated Section 2 of the Sherman Act by monopolizing the shoe machinery trade and commerce among the several States, United declined to sell most of its shoe machines and made such machines available to shoe manufacturers only upon leases which reserved to United the sole and exclusive property in the machines and which granted to lessees the right to use the machines only for the purposes specified in the leases. At all times prior to said May 17, 1954, United offered on lease only all of the machines used by W. B. Coon Co. in the operations described in paragraphs 7 through 13 above and listed in these paragraphs.

17. United's leases for most of its machines, including all such leases between United and W. B. Coon Co., pro-

vided for the payment by shoe manufacturing lessees of flat rental charges or of so-called unit charges based upon the number of shoes upon which the machines were used or upon the number of operations performed by the machines. Leases for the rest of its machines, including all such leases between United and W. B. Coon Co., provided for the payment of both rental and unit charges. Where unit charge machines were adaptable for more than one kind of operation, separate charges were assessed by United for each kind of operation.

18. At all times prior to said May 17, 1954, all leases of United, including all leases entered into between United and W. B. Coon Co., included the following provisions which, alone or in combination with one or more of the others, deter and prevent shoe manufacturing lessees, including W. B. Coon Co. from replacing with a competitive machine each of the shoe machines leased from United.

(a) That the lessee shall use the machine for a fixed period of time, never less than 10 years, subject to renewal for a period of not less than five years; that upon the expiration of the original term or the renewal term, the leases provided that the machinery shall continue under the lease indefinitely subject to the right of United or the lessee to terminate the lease upon 60 days' notice. In practice United did not lease the machinery, subject to termination on 60 days' notice but required the execution of a further renewal lease;

(b) That the lessee of each unit charge machine shall use the machine to its full capacity upon all

shoes made by the lessee upon which the machine is capable of being used;

(c) That the lessee of each unit charge machine shall use the machine each month upon a stipulated minimum number of pairs of shoes, and shall pay to United a stipulated sum of money at the conclusion of each month during which the machine is not used upon said minimum number of pairs of shoes;

(d) That upon termination of the lease the lessee shall surrender the machine to United in good order and condition, shall reimburse United for the cost of all broken or missing parts, and shall pay to United a stipulated sum of money, called a deferred payment or return charge, varying in amount according to the machine leased from about 30% to 40% of the manufacturing cost plus the developmental cost of the machine type, although there is no fixed formula by which the amount is determined.

19. Beginning January 1, 1923, United, by written notice to its lessees established a plan whereby a stated percentage (2% from January 1, 1923, increased to 3% beginning February 1, 1927 and to 4% beginning August 1, 1939) of all unit charges, rentals and minimum charges on a machine were set aside by United to the credit of the lessee solely for the purpose of being applied by the lessee, if the lessee desired, to deferred (or return) payments and, since 1939, to payments for use of the machine less than minimum that might be due or become due under the terms of the lease on that machine or on other machines under lease in the factory. The amount so set aside by

United to the credit of the lessee is commonly known as the "right of deduction fund."

20. In the event that any lessee, including W. B. Coon Co. has desired to return a United machine to be replaced with another United machine, United permits such return upon payment by the lessee, as required under United's leases, of the cost of transportation of such machine to United at Beverley, Massachusetts, the cost of replacement of all broken or missing parts at the regular prices established by United therefor and the return charge established for such machine in the lease. Where a lessee, including W. B. Coon Co., wished to return a United machine solely to replace it with a competitor's machine, United permits the return only on the payment, in addition to the items just stated, of an adjustment or commutation of sums that would have accrued thereafter which is calculated, in the case of a machine leased without any unit charge, at 25% of the monthly rentals payable for the balance of the term and, as to a machine leased in whole or in part on the basis of unit charges, at 50% of the minimum monthly payment for the balance of the term after the waiver of four months for each of the remaining years of the term; that these charges are, at the lessee's option, payable in cash or charged against the right of deduction fund.

21. Although not required to do so by its leases, United has at all times undertaken to repair its machines without extra charge to the lessee except for such parts as are required. As a result no independent repair or service organizations have been able to grow up, and potential or existing competitors of United in the manu-

facture of shoe machinery must either offer repair service with their machines or suffer the competitive disadvantage of marketing machines to shoe manufacturers, all of whom know that repair service will be difficult to provide.

22. As a further means of preventing competition, excluding competitors and expanding its share of the market, United has, where faced with competition in the marketing of one or more types of shoe machinery made by it, adopted, among others, the following practices:

(a) Reduced its own rates on the machinery type or types threatened by competition;

(b) Introduced new models at lower rates than for comparable old models;

(c) Maintained rates on a particular machine type despite a policy of increasing rates on other machine types to meet increased costs of manufacture;

(d) Introduced new models so designed and priced as to reach only that area of the shoe manufacturing industry in which a competitor is attempting to market a machine.

EXTENT OF UNITED'S MONOPOLY AND CONTROL OF MARKET:

23. By means of the unlawful conduct hereinbefore described, United has placed in shoe factories most of the shoe machinery used in the manufacture of shoes in the United States. United supplies from 75% to 100% of almost all of the different types of shoe machinery used in the United States, exclusive of dry thread sewing machinery.

24. The following types of shoe machinery (more particularly identified in paragraphs 7 through 13 above) are required by W. B. Coon Co. in the manufacture of women's and juvenile shoes and are or have been leased by W. B. Coon Co. from United. United supplied approximately the following percentages of the total of all such machines in American shoe factories about May 1, 1947:

Machine Types	United's Share of Total Shoe Machinery in Shoe Factories in the United States as of May 1, 1947
Clicking	97
Eyeletting	81
Pulling Over	99
Bed Lasting	99
Heel Seat Lasting	99
Staple Side Lasting	99
Welt Toe Lasting	100
Welt Sewing	97
Inseam Trimming	99
Outsole Laying	91
Rough Rounding	98
Outsole Stitching	92
Cement Sole Attaching	40
Loose Nailing	98
Fibre Fastening	100
Leather & Rubber	98
Wood Heel Nailing	83
Wood Heel Attaching	96
Slugging	91
Cement Shoe	63
Eyeletting	100

Machine Types	United's Share of Total Shoe Machinery in Shoe Factories in the United States as of May 1, 1947
Fitting Room	58
Goodyear	88
Healing	83
Lasting	88
Pulling Over	97

EFFECTS OF UNITED'S MONOPOLY:

25. The aforesaid practices and conduct of United, its monopolization of interstate commerce in shoe machinery, the restriction of existing competition and exclusion of potential competition in the manufacture, leasing and sale of shoe machinery has had the following effects on W. B. Coon Co.:

a. W. B. Coon Co. has been prevented from acquiring shoe machinery, new or used, as owner either from United or elsewhere to his giving in the sum of $341,597.82.

b. United has extracted from W. B. Coon Co. for the use of its shoe machinery large sums of money in excess of the reasonable value of such machinery and of the service rendered on said machinery and in particular by the requirement imposed by United on it to repay return charges on machinery returned by W. B. Coon Co. to United to its damage in the sum of $25,000.

26. As a result of the foregoing monopolization in violation of the antitrust laws and as a result of the acts

done in furtherance of such monopolization, W. B. Coon Co. has been damaged in the sum of $366,597.52."

WHEREFORE, plaintiff asks that judgment be entered against the defendant hereinabove named in the sum of $1,099,792.76, being three times the actual damage suffered by plaintiff and that in addition plaintiff recover a reasonable attorney's fee and costs as provided by statute.

NIXON, HARGRAVE, DEVANS & DEY,
By /s/ W. CLYDE O'BRIEN
W. Clyde O'Brien, A Partner
Attorneys for Plaintiff,
31 Exchange Street
Rochester 14, New York.

Dated: December 30, 1955.

Decisions

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

Civil No. 6841

W. B. COON CO. and CHARLES J. BRIGGS, as ASSIGNEE FOR THE BENEFIT OF CREDITORS,

Plaintiffs,

vs.

UNITED SHOE MACHINERY CORPORATION,

Defendant.

This case was tried before the undersigned at Rochester, N. Y., on September 5, 1962.

NIXON, HARGRAVE, DEVANS & DEY, Rochester, N. Y., Attorneys for Plaintiffs; W. CLYDE O'BRIEN, *of Counsel;*

HARRIS, BEACH, KEATING, WILCOX, DALE & LINOWITZ, Rochester, N. Y., and DAVIS POLK WARDWELL SUNDERLAND & KIENDL, New York City, Attorneys for Defendant; EDWARD R. MACOMBER, Rochester, N. Y., and RALPH M. CARSON, New York City, *of Counsel.*

FINDINGS OF FACT

1. Plaintiff, W. B. Coon Co., is a New York corporation. For many years it was engaged in the manufacture of shoes with its principal place of business at Rochester, N. Y.

2. On April 11, 1958, W. B. Coon Co., made an assignment for the benefit of creditors, pursuant to the Debtor and Creditor Law of New York, to Charles J. Briggs, Assignee, one of the plaintiffs herein. The assignment included all of its assets, including the claim set forth in this action. Charles J. Briggs, as assignee, is the owner and holder of such claim.

3. The defendant, United Shoe Machinery Corporation, is a New Jersey corporation. It has its principal place of business in Boston, Massachusetts, and is engaged in the manufacture and distribution of shoe machinery.

4. For many years prior to the commencement of this action W. B. Coon Co. was a customer of the defendant. It leased and used shoe machinery from the defendant under a uniform lease agreement known as the Form A lease.

5. Before January 1, 1955, the defendant offered to shoe manufacturers, including W. B. Coon Co., certain machines on a lease-only basis, and certain other machines on a lease or sale basis. The latter machines were sometimes referred to as "optional terms machines."

6. After January 1, 1955, pursuant to the decree in *United States* v. *United Shoe Machinery Corporation*, 110 Fed. Supp. 295, Dist. Mass. (1953), affirmed 347 U. S. 521, (1954), the defendant made available to shoe manufacturers, including W. B. Coon Co., for sale or lease, machines which previously had been available for lease only.

7. After January 1, 1955, pursuant to the said decree, the defendant made available to lessees of its shoe machin-

ery, including W. B. Coon Co., a plan whereby said lessees could purchase the machines then held under Form A lease. The procedure was entitled, "Plan for Terminating Form A leases."

8. After January 1, 1955, when W. B. Coon Co. had the option of terminating its Form A leases and of purchasing the machines covered thereby, it elected to continue some of the Form A leases until their expiration and then to lease the machines again on Form B leases, rather than to purchase the machines.

9. At various times after October 2, 1939, and before the commencement of this action, W. B. Coon Co. held certain machines on Form A leases which were then available for sale.

10. There is no evidence that at any time after October 2, 1939 W. B. Coon Co. would have purchased machines from the defendant, had such machines been available for purchase. There is no evidence that at any time after October 2, 1939 W. B. Coon Co. had available, or was in a financial position to enable it to borrow, the substantial amounts as set forth in plaintiffs' damage claim as necessary to purchase the shoe machinery involved.

11. Shoe manufacturers, including W. B. Coon Co., enjoyed the following benefits from the defendant's leasing system in effect prior to the decree in *United States* vs. *United Shoe Machinery Corporation (supra)*:

(a) it enabled a person or company with comparatively modest capital and with something less than superior efficiency to become a shoe manufacturer,

(b) it enabled persons or corporations to obtain machines for shoe manufacture without purchasing them,

(c) it facilitated repair service and maintenance of leased machines without separate charge,

(d) it afforded a convenient method of exchange of an older United model for a new United model,

(e) it made possible the ability to change from one process to another,

(f) it provided a close approximation of machinery costs per pair among competing shoe manufacturers.

12. There is no evidence that W. B. Coon Co. or any other shoe manufacturer was dissatisfied with the defendant's leasing system in effect up to February 18, 1953, the date of the decree in United States vs. United Shoe Machinery Corp., nor is there any evidence that the features of defendant's Form A lease, a ten-year term, a full capacity clause, the deferred payment charges, or repair service without separate charge—were the proximate cause of any injury or damage to the plaintiffs.

13. There is no evidence of the excessiveness of any of the defendant's rental or unit charges or any other charges in connection with Form A leases for any particular machine.

14. There is no evidence that the defendant secured a monopoly profit on its total operations, or on its machinery branch as a whole.

15. There is no evidence that the plaintiffs computed purchase price for machines which were leased on or after October 2, 1939 would have been a fair and reasonable purchase price at the date of the lease had the same machines then been offered for sale.

16. There is no evidence that the machines held on lease on and after October 2, 1939, and returned to the defendant, would have been repurchased by the defendant or by any other person or company for the computed salvage value as set forth in plaintiffs' computation of damages.

17. There is no evidence that the plan for terminating Form A leases as prepared and presented under the decree represented a proper discount table for the resale price of the salvage value of any machine then held by W. B. Coon Co., for the purposes or in connection with the plaintiffs' computation of hypothetical sale prices for leased machinery.

18. There is no evidence of the salvage value of any machine at the time of its return to the defendant under lease or on hand at the W. B. Coon Co. plant as of December 31, 1954, as set forth in the plaintiffs' computation of damages.

19. There is no evidence of the cost of capital or required return on investment to W. B. Coon Co. if the said company had used its own funds to purchase machines held on lease.

20. There is no evidence that the cost to W. B. Coon Co. of maintaining its machines, if the said company had owned such machines, would have been 6.6% of the total

rental payments paid by W. B. Coon Co. to defendant, as set forth in the plaintiffs' computation of damages.

21. There is no evidence of "estimated return charges" of $20,070.78, as set forth in the plaintiffs' computation of damages.

22. The following subsidiary corporations held machinery on lease from the defendant which were separate from the leases held by W. B. Coon Co.: Wilbur Coon Juvenile, Inc., Coon Juvenile, Inc., Genesee Valley Shoe, Inc., and Foot Caress, Inc.

23. There is no evidence that the above named corporations were in any way integrated or a part of W. B. Coon Co. in the manufacture of shoes or the leasing of shoe machinery from the defendant.

24. There is no evidence supporting the tabulations set forth in the plaintiffs' computation of damages which would indicate that they are true or accurate as computations of a purchase price for defendant's machinery leased by W. B. Coon Co., or of a difference between such purchase price and W. B. Coon Co.'s aggregate rental and royalty payments, nor is there any evidence that the tabulations set forth in the plaintiffs' computation of damages based thereon represent any damage sustained by W. B. Coon Co.

Conclusions of Law

1. W. B. Coon Co. sustained no injury to its business or property by reason of any acts of the defendant in violation of the antitrust laws.

2. Any acts of the defendant held by the court in United States vs. United Shoe Machinery Corp. to be in violation of the antitrust laws were not the proximate cause of any injury to the business or property of W. B. Coon.

3. Plaintiffs have not proved any violation of the antitrust laws relevant to the cause of action set forth in the amended complaint herein.

4. The New York six-year statute of limitations, Civil Practice Act, Sec. 48, which is applicable herein, as extended by the Federal tolling statutes (56 Stat. 781, 59 Stat. 306), bars recovery by the plaintiffs with respect to leases executed by W. B. Coon Co. with defendant before October 2, 1939, and during the period between October 10, 1942 and June 22, 1943.

5. The Form A leases between W. B. Coon Co. and the defendant during the period 1939 through 1954 were not by themselves illegal.

6. Defendant's policy of lease-only as to certain machines during the period 1939 through 1954 was not by itself illegal.

7. W. B. Coon Co. sustained no damage.

8. The defendant is entitled to judgment of dismissal upon the merits of the claim of plaintiffs and each of them.

HAROLD P. BURKE
U. S. District Judge

April 12, 1963.

Testimony

[15] LAWRENCE B. SHEPPARD, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Hayes:

Q. Where do you reside, Mr. Sheppard? A. Hanover, Pennsylvania.

Q. What is your occupation? A. I am a shoe manufacturer.

Q. Are you connected with the plaintiff in this action? A. I am.

Q. In what capacity? A. Presently chairman of the board of Hanover Shoe, Inc. and president of Sheppard & Myers, Inc., a totally-owned subsidiary of the Hanover Shoe.

Q. How long have you been connected with the plaintiff, Mr. Sheppard? A. 41 years.

Q. It goes back to 1921? A. Yes, sir.

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Lawrence B. Sheppard—Direct

Q. That's right. A. Yes.

Q. Now, of those machines—let me ask you [26] a preliminary question first. Did Hanover use those United machines which were needed in the Goodyear welt process? A. What was the first two words of that question, did Hanover?

Q. Yes, those machines which it needed in the Goodyear welt process. A. Yes.

Q. And as to those machines, were some of them simple machines and others complicated machines? A. Yes.

Q. Speaking generally, now, were the complicated or not simple machines available from United on a purchase basis? A. Not many, if any. You are still talking about 1921?

Q. That's right. A. Very few, if any, I recollect.

Q. Were they available only on a lease basis, the complicated machines? A. Yes.

Q. And did that condition continue down through into 1955, the availability of machines from United, the more complicated machines on a lease-only basis? [27] A. The more important machines, the more vital machines in making welt shoes, that did continue. And some of what I care to refer to as minor, more or less important, minor machines, they were available on lease with an option to buy. Many of them were.

Q. Now, from your experience in Hanover, are you acquainted with the process of making a Goodyear welt shoe? A. Yes, sir.

[28] Q. Could you describe that process to the Court? Are you able to do so? A. I am sure that I could describe the higher points in the major operation—

Q. Have you—pardon me. A.—unquestionably I have forgotten some of the little minor operations. It has been variously estimated that there are between a hundred and two hundred operations in making a pair or fine Goodyear men's welt shoes. I have counted them in bygone days and never came out with the same answer, but it is a complicated process.

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[54] *By Mr. Hayes*:

Q. You mentioned that when you first came with Hanover the bulk of the machines in the factory that were used

in the shoemaking process were United machines. A. That's correct. Yes, sir.

Q. Speaking generally, that continued down through 1955? A. Generally speaking, yes. There were some exceptions to it.

Q. Now, you also testified that the major or most complicated, or call it what you will, machines were available only on a lease basis and could not be purchased; do you recall that? A. Yes, sir.

Q. And did that continue, that situation, down to mid-1955? A. Yes, sir.

Q. Did Hanover, during the period that you were with the company, make any effort to obtain from non-United sources comparable machines which it could purchase? A. Yes, we did.

Q. Well, let's take at the beginning, take [55] in the early '20s, when you were first with the company. Can you tell us what efforts you made, or what investigations you made, in an endeavor to find machinery available for the welt process that you could purchase? A. Well, I don't know as I can describe investigations that took place 40 years ago. I had better tell you some of the things we did. We bought some Reece machines, 10 or 20 of them, to try to substitute for the United clicker, and we used those machines for three or four or five years. They really were not satisfactory. They had heavy beams, heavy as to the operator. They had to keep swinging them back and forth. They had a foot treadle which was somewhat dangerous in case he got his finger under the beam and about that time touched it with his foot, and the United machine was much safer. We did buy, I believe, 11 of those Reece clicking machines.

Q. And did you later abandon their use? A. Yes, we did.

Q. And go back to United clickers? A. Yes, sir. I think we kept two or three of them longer cutting cloth linings, but we eventually [56] abandoned all of them within five or six years, I can't tell you just how long.

Q. Did you visit other welt shoe factories in the '20s or '30s— A. Yes.

Q. —in an endeavor to locate machines that you could purchase? A. Well, in an endeavor to see if there was anything new that could be purchased, and so forth, but of course, also to see their shoemaking and try to improve my own, both, a combination.

Q. Do you remember some of those factories? A. Yes, I can remember very well my early visit to Nunn-Bush, and Mr. Henry Nunn himself was living, which is what makes it stand out in my mind. Nunn-Bush have always made very fine shoes, and still do. I was out there twice, I think, in the early '20s, once perhaps in 1921 or '22, right after I went to work, and another time, three or four times, a year later.

I visited Florsheim's. I remember that quite vividly because there is where I met and got to know Mr. Irving Florsheim, who afterwards became president of Florsheim Shoe Company, and that [57] friendship continued some of those years. I am just stating some of the reasons those visits stand out in my mind.

I went to some New England factories over a course— about a course of several years now.

Q. That's right. A. I went to Endicott Johnson's a couple of times, and Freeman of Beloit, Wisconsin. No doubt many others.

Q. Can you name any of the New England factories that you visited? A. Yes. I visited the old Douglass plant when they were in their heyday making about 9,000 pairs of men's shoes a day, or something like that. I don't pretend to be accurate, but it was a large quantity, I remember it very well. And some other smaller factories in New England. I can't immediately recall.

Q. Now, did that search which began in the '20s continue down through the years, down to 1955? A. You mean the search for machinery that could be purchased?

Q. Correct. A. Oh, yes, that still was continued through [58] 1955, all through the years, more or less intensively, but it is still continuing today.

Q. Can you tell us some of the efforts that were made coming down now through the war or post-war period in an endeavor to find machines that could be purchased that would be comparable to the United machines you were leasing? A. During World War II that was more or less dormant; there wasn't very much that could be done about it for a couple of reasons. First, we were all intent on the war and making war material and, secondly, because the war effort was requiring practically all the machine facilities in the country, and in Europe too, for that matter, so it was at more or less of a standstill from about—guessing again—the time the war broke out in Europe, a year or two before '42.

However, there was conversation when shoe men gathered, as there is always a matter of conversation when shoe men gather, but the only way we have to transmit our views to each other is not much of a press and trade magazine that does that, and we are gossips, and I am confessing that we are great gossips in exchanging information.

[59] Q. I don't hear you. A. I am confessing the personnel of the industry are great gossips. We compare notes whenever we get together a great deal; it's a habit.

Well, there was some talk toward the end of the war that, if the war ever ends, we must try to do something about perhaps some foreign machines that could become available, and we all surmised at that point—

Q. Let me interrupt at that point.

Did you spend your full time in the Hanover factory during the war? A. No, I spent very little of it.

Q. Where were you during the war? A. Most of the time I was in Washington, and the other time I was overseas.

Q. And what were you doing in Washington? A. I was with War Production Board, in the Hide, Leather and Shoe Division, and our chief duty there was to try to implement supplies of military—production of military shoes.

Q. And you went to Europe, you said. What did you do there? A. Well, I was requested to go there by the [60] headquarters staff of SHAEF.

Immediately following the Bulge, we had terrific incidence of trench foot, which is a very serious thing. Trench foot, they say, will permanently incapacitate more men from returning to active duty than bullet wounds.

At the time I was sent for, which was in the latter part of January—

Q. 1945? A. 1945—we had some 40,000 cases of trench foot, hospitalization. And before the middle of March it had gone up to some 75,000 or 80,000, which meant there were over five divisions, fighting divisions, incapacitated, and there was a good deal, apparently, of mystery as to

what caused trench foot. Of course, the doctors knew a great deal—that it was not just necessarily temperature. You could acquire trench foot in 40-degree temperature, provided you had your feet wet for two or three days and were pinned down in a foxhole.

My summons to come over there came, as I said, from SHAEF, sent by General Lee, who was General Eisenhower's assistant, so I went.

Q. That was in connection with an investiga- [61] tion as to how to prevent trench foot? A. That, and what we were doing to cause it.

Q. Now, I interrupted you to cover your war period. You had just mentioned that after the war you had developed an interest in the possibility of obtaining foreign machines. Will you carry on as to what you were going to say in that connection, Mr. Sheppard? A. Well, that thing developed in numerous and sundry ways. Various machine agents in this country got into the act, uncovered some machines for which they could get the agency and bring it over here.

Q. You speak of machine agents. Do you mean American firms who had agencies representing foreign machine manufacturers? A. That's what it amounted to. There were several of them. The one that stands out in my mind is the fellow named Schwabe, who had, I don't know how many, lines of various machines, or claimed he did, and did have some, to my knowledge, and others. And foreign machines started to come in here on trial, and we tried—we and some others tried—quite a few of them.

[62] Q. You say this was after the war. Can you fix more definitely a time than just after the war? A. The time when it all began? Well, I'm afraid I'd be guessing somewhat, but a good guess would be '48 or '49, I think.

Q. All right. Proceed, Mr. Sheppard. A. The National Shoe Manufacturers Association, at the insistance of its members and directors, began to take an interest.

Q. Will you tell the Court who is the National Shoe Manufacturers Association, or what is it? A. The National Shoe Manufacturers Association is a trade association in the shoe industry, and at one time we claimed a membership representing some 85 or 90 per cent of the shoe production. I hope that's accurate, but it is somewhere near accurate. I was president of it from late 1945 through 1949, and that's how I placed the recollection I have just stated previously.

Then, as I recall it, either just before my term of office expired or just afterward—I am hazy on that recollection—the National Association formed a so-called technical committee, of which I [63] was a member. That committee's duty then was to search and disseminate information for modern shoe machinery wherever it could be found and to assist manufacturers in evaluating it, disseminate information to the members, and so forth and so on, as near as I can recollect.

Q. About how many members were there of this technical committee? A. I am sorry, I am guessing, but I would say about a dozen; 10 or 12.

Q. Can you name some of them and tell us what companies they were connected with? A. Yes. Well, Sam Slosberg comes to mind; Mr. Charlie Johnson—

Q. Would you name their companies too, Mr. Sheppard? A. I will try. They make children's shoes—Slosberg makes children's shoes, and I think it is called Green Shoe Company, I am not positive.

Mr. Charlie Johnson, of course, was president of Endicott Johnson, the second largest shoe manufacturer in the world at that time.

Mr. Byron Gray, at that time either the president or the chairman of the board, I have for- [64] gotten which—there was a change made in there—president of International, the largest shoe company in the world.

Warren Reardon from the New England states, and I can't tell you the name of his company; I should be able to, but I can't.

Q. Is Mr. Stewart a member of that committee? A. Yes, sir, Weir Stewart. They were from Syracuse, I think.

Q. Did Mr. Stewart succeed you as president of the Shoe Manufacturers Association? A. Yes, he did.

Q. What did this technical committee do? A. Well, they—

Q. First of all, let me ask you: is this the committee that you guessed was organized somewhere around the end of your term office or the beginning of Mr. Stewart's, somewhere around '49 or '50? A. Very late '49 or early '50.

Q. Finish. Tell us what the committee did, Mr. Sheppard, if you will. A. I don't mean to be facetious, but they talked a lot first, and they tried to get organized and tried to perform their duties; and among other [65] things they did, about that time I think there were rumors of an increase in royalties—

Q. Increase in royalties on what, by whom? A. On shoe machinery, by the USMC. And I think that perhaps distracted them a little while from their other investigations, and so forth, and they pursued that in protesting the raise in several meetings.

Q. Were you a partner to that protest? A. Yes.

Q. Do you recall the year in which that took place? A. I think it first started in somewhat of a protesting way, maybe mid-1950 or a little earlier than that.

Q. All right, proceed.

Let me ask you one question first, though. Was the protest successful or did the increase in rates go through? A. You mean ultimately?

Q. Successful. A. There were several meetings and quite a lot of work done by both sides. No, it was not successful, the increase went through.

[66] Q. All right. Now, what did the committee do with respect to endeavoring to discover non-United machinery which would be available in place of United's lease-only machinery? A. Well, of course, a lot of work, investigatory work on a big, broad problem was done in part under the direction of the committee but by the staff of the association, and at some time along this road they employed a full-time man who they considered a shoemaker, thoroughly versed in the problems of a shoe factory and had been a shoe factory superintendent for many years, and gave him the full-time job of exploring, searching and looking, and eventually he and his—part of this committee—I did not go, but a goodly part—went abroad.

Q. Is that the trip that took place in 1952? A. Yes, sir. They made quite an extensive study of French, German, Italian and English shoemaking and factories, machine availabilities, all that sort of thing.

To my list of the committee members, it just occurred to me, I would like to add Mr. Allan Cadwell of Freeman.

Q. Freeman Shoe Company? [67] A. Yes.

Q. By the way, who was this expert that was employed? A. A fellow by the name of James Nolen.

Q. All right, proceed, Mr. Sheppard. A. It is not clear to me just what you—which direction you want me to proceed.

Q. Well, after the committee made its trip abroad, did it report on its findings? A. Yes; in detail to the membership through the trade association, and in special reports to the membership, and in about every other way they could they tried to disseminate the information that they had acquired and did disseminate it pretty well. They gave us a lot of leads. They did not pretend to sit in judgment as to whether a particular machine would do the standard of work required by a particular American manufacturer. They described the machines as well as they could, either in meetings or through circulation of data, and then it was up to the manufacturer to decide whether he wanted to go through the expense of trying one or more of these various, numerous machines.

In the meantime, the people who had [68] acquired agencies for many of the foreign machines were busy trying to sell them to anybody that was interested.

Now, I think most everybody in our segment of the industry—I know nothing whatever about shoe production outside of men's welt shoes—

Q. When you say "outside," you mean you are talking about men's welt shoes? A. That's right. It doesn't mean some of the machines cannot be adapted back and forth to other makes, but I don't know much about them.

So between those that were most interested—and I have two or three in mind that I knew best—I don't say they were most interested; perhaps they were, perhaps they weren't—there was a lot of exchange of information between Hanover and Freeman in Beloit.

Q. Freeman Shoe Company you mean? A. Yes—which at that time was being run by Mr. Allan Cadwell, who was general manager of it; and some of our men did a good deal of talking with Weinbrenner, who was trying a lot of machines.

Now, what we would do, if we had this machine, they had that machine, we would exchange in- [69] formation as to how we liked it or did not like it or why.

Q. You are speaking now of the foreign machines; is that it? A. Yes, yes, entirely.

Q. Go ahead, Mr. Sheppard. You exchanged information, you said, a great deal with Weinbrenner and Freeman. A. That doesn't mean at all that I did most of it or—but I did do some of it.

Q. Who else in Hanover would engage in this exchange of information? A. The people that were responsible. Now, unfortunately, we lost a superintendent, Roy McDonald, who was, I think, in 1949—'48, '49. He started some of this, and then he was succeeded by Mr. Ray Purtell. But in the meantime—I can't tell you what year—Mr. Allan Cadwell came with us from Freeman.

Q. That was toward the end of the complaint period, was it not, in 1955 or late '54? A. I think it was. And he directed a lot of this investigation, trial and error. He was splendid on the subject, fresh from it and interested [70] because we were doing a great deal. I think that he directed that for a short period, at least, until he died, unfortunately.

Q. Was that Mr. Cadwell the same Mr. Cadwell who had been with the Freeman Shoe Company? A. That's right.

Q. Now, in addition to the exchange of information between Hanover, and its plant superintendents, and representatives of Weinbrenner and Freeman, you had available to you, I assume, the information that was obtained by the technical committee in Europe with respect to the foreign machines? A. Yes; so did they.

Q. I am sorry. A. So did these other companies.

Q. So did they.

Did you in addition have conversations with any members of the technical committee who made the trip to Europe? A. Oh, yes.

Q. With whom? A. Well, I remember going over Byron Gray's copious notes with him. He was the president of International or chairman of the board, I don't know [71] which. I talked at length with Warren Reardon. I talked at length with Allan Cadwell, who, I think, made that trip, I am quite sure.

I talked at length with Henry Boyd, Jr., who was then president of the General Shoe Corporation. I talked with Sam Slosberg. I talked at length at one time or another about this particular trip, which we would call the first trip.

Q. Was Mr. Nolen on that trip too? A. Yes.

Q. Did you have conversations with him? A. Yes, lengthy conversation at various times.

Q. Now, in addition, did Hanover have available to it, or did it receive, catalogs of the various representatives of European shoe manufacturers doing business in this country?

Mr. Carson: Excuse me. Can I have the question read back?

(Question read.)

A. If they had catalogs, I am sure we received them. I don't recollect seeing any myself. I have seen some circulars, such as or similar to these pictures we were discussing, purporting to be some [72] machine or another. I don't know that they had real catalogs. If they did, I didn't see them.

Q. And did Hanover subscribe to any trade publications that would carry advertisements with respect to foreign machines? A. Well, I think we have always subscribed to practically all of the trade publications, so if there were any advertisements, I presume they had been covered. I guess they were.

Q. Now, you went through a shoemaking process earlier this morning. What is the quality of the Hanover product? A. We think it is pretty good. I mean that.

Q. Yes, I know you do. A. I am not being smart. We try to use the better grades of shoes, best raw material that can be procured, and we think our standards are about as high as we can get them, which has always been endeavored.

Q. What about the leather that goes into your shoes? A. Well, we use some of the finest upper leather that is made, both domestic and imported. We are very proud of our sole leather, which is [73] tanned on contract and tanned longer, which is the old thought to make the best sole leather with a maximum of vegetable and a minimum of synthetic than most.

Q. Now, you have told us about the efforts made in broad scope over the years to learn about non-United machines which could be purchased and which could replace United's lease-only machines.

Mr. Carson: I object to that summary of the testimony. I don't think the witness should be led in that way.

The Court: Read the question.

(Question read.)

The Court: All right. I think you ought to rephrase your question. Don't lead the witness.

Mr. Hayes: I am trying not to, but I didn't think that was leading, as a matter of fact.

The Court: Maybe it isn't. It is a summary.

Q. Let me ask you this question: Did Hanover have a policy of purchasing machines—

Mr. Carson: I object to that as leading.

[74] The Court: I will overrule it. That calls for a yes or no answer.

Go ahead.

A. Yes.

The Court: What is the answer?

The Witness: Yes.

By Mr. Hayes:

Q. Would Hanover purchase a machine which was not as efficient as a United machine which was its counterpart?

A. I lost one or two words at the tail end of your question.

Q. No wonder, I even lost my thought.

Would Hanover purchase a non-United machine which was not as efficient as or would not do as good a job as its United counterpart?

Mr. Carson: I object to that as leading. I think counsel should ask what the policy was.

The Court: We will take it. Overruled. Go ahead.

A. I presume you are asking me if Hanover would purchase a machine that would not do the quality of work that the United machinery did; do I understand [75] your question?

Q. That is correct. A. No, they would not purchase it.

Q. Is that because of Hanover's requirement of high-quality performance and high-quality production? A. Was that "because of," did you say?

Q. Yes. A. Because of?

Q. Yes. A. Yes, to a certain extent it was. We have never given away on quality for convenience of material, or machinery, for that matter.

Q. Now, over the years, down to 1955, as a result of the search you testified was made and of the information you obtained, did Hanover find any non-United machines equivalent to United lease-only machines? A. What dates did you give me the range of?

Q. Down to 1955; machines of non-United manufacture which Hanover bought and tried and found to be at least the equivalent of United machines. A. There weren't many.

Q. Can you identify any? [76] A. Well, there were three that I can remember: a clicking machine, that's the upper leather clicking machine, and the sole leather dieing out machines, and a foreign sole laying machine.

Q. What clickers did you find— A. I hadn't quite finished my answer.

Q. I am sorry. A. And we found one other machine, a staple side lasting machine. We thought we had found

something, bought it and paid for it, but it didn't stand up and we discarded it later. That finishes my answer.

Q. So far as you can recall, those were the only non-United machines you found which at any time you thought were comparable to United's lease-only machines? A. That could be purchased.

Q. That could be purchased, yes.

Now, you mentioned clickers. Did Hanover buy clickers from other shoe machinery manufacturers? A. Yes.

Q. From what manufacturers or agents? You may not know the manufacturer. [77] A. I am not sure of the agents. We bought from Bata Machines, we bought another name that is familiar to me but I can't recall it, and we bought some so-called Schwabe machines. I don't know if Schwabe had his name on them.

Q. Was the other name Montreal? A. Yes, sir.

Q. And was that early in the period or toward the latter part of the period? A. That was very early in the period.

Q. Now, about the— A. I would like to correct that. What period are you talking about?

Q. The period of the complaint, up to 1955. A. No, it was at least part of the period, not the very end.

Q. Was it in the '50s? A. Yes.

Q. It was in the '50s that you found these various clickers? A. Yes.

Q. How about the sole leather dieing out, you said you found a machine there? A. We found those some years before, if I [78] recollect correctly.

Q. Was that in the '40s? A. Yes, early '40s.

Q. What machine did you find there that was comparable to the United? Do you recall the name? A. I am

trying to. I think a fellow named Mathey built some of those machines, and some of them were procured from Schwabe again, I think.

Q. Did you buy any Hammill [*sic;* should be Hamlin] dieing out machines? A. Yes, but I think that's the one Mathey sold.

Q. It is the same machine you have in mind? A. Same machine.

Q. Now the sole laying. That was in the '40s, you said. Take the sole layer; what was that machine that you found? A. That machine, according to my best recollection, was about 10 years ago, around '51, '52 or '53, and I think that that was a foreign machine.

Q. Do you remember the name? A. Albeko, but again I think Schwabe was the agent. I think they were purchased from Schwabe. I have no record of it.

Q. Did you buy any Lamac sole layers? [79] A. Yes. And I must correct my previous testimony, the Lomac [*sic*; should be Lamac].

Q. That was about 10 years ago? A. Yes. I don't know if Schwabe was in that picture or not. He was in almost every one for a while.

Q. You mentioned that you tried a staple side lasting machine that you obtained from Schwabe and was found unsatisfactory, that you purchased. A. Yes, and discarded it.

Q. Was that also in the '50s? A. It was in the '50s, yes.

Q. Do you recall the manufacturer— A. I think it was a Montreal.

Q. You don't recall the manufacturer? A. Not clearly, no. I think it was a Montreal.

Q. Now, aside from these three or four machines you mentioned, so far as the manufacture of Hanover shoes was concerned—I am speaking now of United's lease-only machines—were those machines the best machines available for the Goodyear welt process? A. You mean the machines we bought?

[80] Q. No, no, aside from those you bought from others, were the remaining United machines which you used and which you obtained on lease only the best available machines for your process? A. Unquestionably.

Mr. Hayes: If you will excuse me a moment, your Honor.

The Court: Certainly.

(Discussion off the record.)

Mr. Hayes: I would like to have marked for identification—these were obtained by us on inspection of defendant's records in Boston—five outside manufacturer installation reports, commonly referred to as OMIRs. One is dated September 20, 1951, two dated September 21, 1951, one dated September 27, 1951, and one dated October 30, 1951. I would like to offer them as a single exhibit, and I understand from Mr. Carson that he does not object to that technique.

The Court: All right.

Mr. Carson: No objection.

(Marked Exhibit P-22 for identification.)

Mr. Hayes: I would like, with the Court's permission, to refer to certain information.

[81] The first, dated September 20th, has to do with the report that Hanover Shoe had three

trimming machines, type 50, made by Montreal Shoe Machinery Corporation of Montreal, Canada, for use in men's Goodyear welts, and the comment is:

"This customer now has a total of four of the above type machines installed and it has been reported that a fifth machine is in transit. This customer desires to purchase as many machines as possible, thereby saving unit charges."

The second one has to do with a welt beating machine, made by Montreal, not as yet installed, to perform the beating of welts. The comment is:

"If satisfactory, this machine is to replace our B & S machine"—is that right, "B & S"?—This was the eccentric roll-type. As the customer has not yet started it and we have not seen it in operation, we cannot describe the job done by this machine. Further reports will be submitted. Customer prefers to own equipment, thereby eliminating unit charges.

The third has to do with the lasting machine, [82] heel seat:

"Customer believes machine made in Germany to perform seat lasting."

The comment is:

"Mr. McDonald informs us he has on order a machine of this t[illegible] Delivery date uncertain. This machine is repo[illegible] to have been ordered on a trial basis and it is customer's belief that it is of German manufacture. Customer prefers to own equipment, thereby eliminating unit charges."

The next has to do with three press LaMac sole of LaMatie Process Company of Erie, Pennsylvania.

It is reported the sale price of these machines is approximately $400 each, used for sole laying:

"Three of these machines have now been installed and are in operation. Customer prefers to own machines, thereby eliminating unit charges."

And the last has to do with an outsole stitching machine, nameplate reads "Adrian-Busch Made in Germany, Frankfort," etc., installed by Blottner and McDonald of Hanover Shoe; reported sales price less than $2,000, to be used on outsole [83] stitching.

"Please refer to Rumor Report submitted under date of September 21. Customer prefers to own equipment, thereby eliminating unit charges."

"Facts pertaining to machine on reverse side," and that is a group of technical comments, at least they are technical to this poor lawyer.

I don't know whether I formally offered these in evidence. If I did not, I intended to.

The Court: I think you did. If not, they will be admitted.

(Exhibit P-22 for identification received in evidence.)

Mr. Hayes: I would also like to offer two what are known, I believe, as competitive information bulletins, also obtained on a search of United's records, one dated October 1, 1951, and one December 26, 1951, as one exhibit.

Mr. Carson: No objection.

The Court: Admitted.

(Marked P-23 for identification and received in evidence.)

[84] Mr. Hayes: The first of those is Bulletin No. 689, addressed to Mr. Wogan, with copies to various United personnel.

(Mr. Hayes reads from exhibit.)

Mr. Hayes: The second is Bulletin No. 701.

(Mr. Hayes reads from exhibit.)

By Mr. Hayes:

Q. Mr. Sheppard, I would like now to direct your attention to what have been called the optional machines made by United Shoe Machinery Corporation. I mean the machines that any customer could either lease from them or purchase from them.

Did Hanover purchase some optional machines from United? A. Yes, sir.

Q. And did it lease some optional machines from United? A. Yes, sir.

Q. Generally speaking, are the optional machines the ones that are the more complex or the less complex machines? A. Generally speaking, they are the less complex, simpler machines.

[85] Q. Now, in addition, did Hanover on occasion rent shoemaking machines from others than United? A. In a few instances, yes.

Q. And did it also on occasion purchase machines from others than United, other than machines—that is, the counterparts of——

Mr. Hayes: I will withdraw that. I have gotten all twisted.

Q. Still confining your attention to the so-called optional machines of United which could be available for purchase, did Hanover on occasion purchase from other

shoe manufacturers machines which were the counterparts of United's optional machines? A. I am sorry, I don't understand your question. You asked me if Hanover purchased from other shoe manufacturers?

Q. Machines they made. A. Shoe manufacturers don't make machines.

Q. Did I say "shoe manufacturers"? I am sorry, I meant shoe machinery manufacturers.

Did Hanover on occasion purchase from other shoe machinery manufacturers machines which were counterparts of optional machines made by United? A. Yes, we did.

[86] Q. Were those purchases bulk, large? A. No.

Q. Now let me direct your attention, if I may, to another subject having to do with shoe machinery, and that is the subject of service of the machines and availability of parts for machines. Will you explain to the Court, please, what, if any, importance attaches to the proper servicing of machines and to an adequate supply of parts for machines? A. Well, tremendous weight must be given to the availability of parts, and, of course, service in a little different way is equally important. But unless parts are available, you can't repair the machines. That's very evident. That was a consideration in the early importations of foreign machinery, the question of whether you could get parts and keep in parts, and so forth. That was always a consideration in purchasing the machine.

Now, how generally you want me to go into this—

Q. I wish you would. A.—I don't know, but up to a certain period the USMC furnished repair service through their requirement, and that was included in our royalty [87] and rental bill.

Q. You mean there was no extra charge for this? A. There was no extra charge, no, but it developed later that

the cost was included, and finally they made it optional where you could do your own repair work after the decision in the other case, and we immediately took advantage of that opportunity and set up our own repair service.

Q. That was in 1955, was it not? A. I think so. My dates are a little twisted, but I think so.

Now, as to the availability of parts from the United over a period of 40 years of my experience, the parts service was satisfactory. All of us, we have ups and downs, and there were a couple of occasions when parts were hard to get, particularly during distress years, there was squabbling about parts, but it was, by and large, over a period of about that time that parts were available. Of course, you were charged for all parts, you know.

Q. Yes. You paid extra for parts? A. Oh, yes.

As to the service, I believe I did say [88] that by and large the service, over my experience with the USMC, was good service, it was satisfactory service. I had my own pet peeves about some of it, but—

Q. Well, why don't you tell us what your pet peeves were? A. I said the service was good, and it was, by and large.

I always had an idea it was costing too much for the reason so many of their agents, although a good part of this time, or some of this time at least, they got to work about 9 and quit at 3, and if I knew it was in the bill I worried about it, and later I found it cost about X amount—

Q. I am sorry, I can't hear you.

Mr. Carson: Could we have the last sentence read?

(Answer read.)

A. When the offer came from the USMC to give us so much credit—I have forgotten the amount—

Q. You mean referring to the 13.3 per cent of the total rentals and royalties that were supposed to cover the service? [89] A. That was against the service. In other words, we do our own service and they give us a credit.

Q. And since 1955, when you were permitted to elect whether to do your own service or not, has Hanover done its own service? A. Yes, sir, we did it pretty promptly after we became aware of the credit.

Q. Now, what was the need for good service? What is the consequence of bad service or poor parts or unavailability of parts? A. Well, the unavailability of parts, of course, set down a machine as part of a continuous line of operation, depending on how many machines you have on a particular operation to do, say, 6,000 pairs a day, and if you have six machines on that particular operation, you take one-sixth of your production down, it jams up the whole factory and raises cain with you. If we don't have parts, we can't fix a machine. There were several parts to this question. You will have to—

Q. Keep on going. A. I ran out of parts of your question. What was the other part of your question?

[90] Q. Part was: what is the importance of service and parts and what are the consequences of poor service or lack of parts, those are the two parts of my question. There are two questions really. Let me start over again. A. You break your continuity of production and you can't get your machine fixed, you can't get a part. If you don't fix your machine right you are going to turn out bad work and then it has to stop, and the consequences are bad.

Q. During this period—I am sorry. A. I say the consequences are serious. These various questions you asked me—

Q. By serious consequences, are you referring to stoppage of production you mentioned before? A. Yes; or plus [*sic;* should be poor] work will not be accepted. That means damage to shoes until you catch up with it; and damaged shoes and stoppage of work and everything else, it is quite serious.

Q. There are two consequences mainly: one is stoppage of work and the other is poor production? A. Poor quality. Maybe this is a good time for a recess.

(Recess.)

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they got it; and on occasion we bought parts when we got stuck for one reason or another.

Does that answer your question?

Q. I think it does, Mr. Sheppard.

Of the two kinds of machines that United had, those which were available only on lease and those which could be purchased, which had the greater need for a ready supply of parts? A. I would say the ones on lease did for the reason that practically all of the machines on lease were the larger, more important, more fundamental machines. That is the reason for that statement.

Q. Generally speaking, were the machines that could be purchased of a similar type? A. Yes, sir. Yes, sir.

Q. Now, earlier you testified, Mr. Sheppard, that on occasion Hanover rented machines from other shoe machinery manufacturers. A. We did, yes.

Mr. Hayes: I might mention that the questions I am now about to ask, the details will come out of Mr. Spear's testimony, but as long as Mr. [93] Sheppard is on the stand he can answer the parts I have now.

Q. Among those manufacturers was the Mitchell Company. I think it was John Mitchell heel builders. Do you recall renting machines from that company? A. Yes, we did. They were heel building machines and machines that had to do with heel building, such as lift grading machines and three or four machines.

Q. And you rented those machines from Mitchell, did you not? A. According to my best recollection, we did.

Q. So as far as you know, were those machines available for purchase from Mitchell? A. No, I don't think so. I am quite sure we inquired into that a couple of times.

Q. And at other times Louis Freeman machines were leased by the Hanover Company, were they not? A. That's correct.

Q. Now the same is true, is it not, of United Shoe machinery, which was available to customers for either lease or purchase, wasn't it? [145] A. Yes, you mean so-called optional machines?

Q. Yes. What counsel yesterday called the optional terms machine. You testified about that. A. Yes.

Q. Hanover sometimes leased them and sometimes purchased them, did it not? A. Yes, sir.

* * * * *

Q. Under the practice in connection with your form "A" leases you understood you were entitled to return the leased machines to the lessor when it suited your purpose

to do so? A. Yes, for many years for a charge, a return charge, which later worked into an accumulated credit system by United where it might or might not cost you a hundred or two hundred to return a machine, depending on the amount of credit you had built up in your reserve.

Q. I will ask one more question before the recess. Was that accumulated credit system you have referred to sometimes called the Right of Deduction Fund? A. Yes, I think that is the correct name of it.

Q. And you were given the opportunity, were you, on returning to United leased machines which for any reason you didn't want to use any more, the right to pay any return charges out of this Right of Deduction Fund? A. If we had—

Q. If you had a credit. A. On the credit side of the ledger, yes.

[155] Q. And your company always did have a credit, didn't it? A. Yes.

Q. Because of your extensive use of the leased machines, is that correct? A. That's correct.

* * * * *

Q. Without holding you to detail, Mr. Sheppard, I ask you whether it was your understanding that the Right of Deduction Fund was built up by United in 1939 to 1954 out of certain percentages of payments that your company and others made on their leases? A. You mean the general fund, not the fund?

Q. The Right of Deduction Fund which we described before the recess. A. I understood it was a specific fund credited to each company.

Q. Yes. Out of what money? [156] A. Out of earnings of royalties or royalties and rentals both, I don't know which, of returns from the shoe company to the USMC.

Q. And the earnings out of which— A. I mean the earnings of the machines.

Q. Yes, the earnings of the machines out of which this fund was created by United you understood to be payments which each company would make under its leases, is that right? A. Yes, a percentage of those.

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[158] Q. Now it was out of payments made to your company in accordance with this kind of lease, D-6, with the terms which changed in accordance with the type of machine that the Right of Deduction Fund was built up, as I understand your testimony? A. Yes, that's correct.

• • • • •

Q. So you could by virtue of the Right of Deduction Fund return to United surplus machinery without charge whenever you wanted? A. Without charge provided you had a credit, of course, as we have talked about.

• • • • •

Q. So that under the practice as you remember it, your company had to pay for broken and missing parts, I might as well add transportation too on returned machines? A. I am not quite sure about the transportation.

Q. But subject to that—

A. Yes, I assume you paid the freight both ways.

Q. Subject to that, on the lease arrangement, you had a flexible arrangement whereby you could [161] return the machines either for another machine or a new model? A. Yes.

Q. And you did that to a considerable extent, did you not? A. Of course you did, you didn't keep machines around to pay on them that you didn't need, and when new models came along, you could return the old model within limitations and only be charged for this part matter that I spoke of.

Q. And you frequently did return an old model for a new model, didn't you? A. I don't know how frequently, but we did it many times, let me put it that way.

* * * * * *

Q. As I understand your answer you had the option to determine when you wished to return an old model for a new model, and within the limitations you described you did so to United Shoe under the leases? A. Yes, we did quite often.

* * * * * *

Q. This letter deals with a replacement of six assembling machines which had been received by Hanover in the year 1926 as to which the writer calls for new machines. Do you remember a discussion on that subject with Purtell? A. Not specifically, no, sir. I think that that—that Purtell was pursuing a policy, call it a policy, not in a serious way, of bettering his situation by using up more of his return fund credit.

Q. And he was in doing so getting the advantage [177] of equipping the factory with new machines in place of old machines under the leases? A. That would be the result of it, yes.

* * * * * *

Q. He had the right to do that under the leases and you approved of his doing it? A. I think he had talked about

it and decided it was a smart thing to do to take advantage of the fund that we had earned and accumulated in the credit to replace some of those old 1927 or '30 machines with new machinery.

Q. You considered this the smart thing to do? A. Why, of course it was. We had the credit and weren't using it. We had earned the credit, why shouldn't we use it?

* * * * * *

Q. Did any company make a complete line, so far as you knew, during 1939 to '55? A. A complete line adaptable to our standards and use.

Q. Let's say a complete line of shoe machinery. A. I couldn't answer that. I wasn't interested in any line except as applicable to our shoe.

Q. And by adaptable to your standards and use, what do you mean? A. What do I mean?

Q. What do you mean by it? What kind of machines do you designate as adaptable to your needs? A. Similar to the work performed by United machines.

Q. And you were, as I understand, making a search at some time in this period for machines of [204] that kind that you could purchase; it that right? A. Yes, sir.

Q. Did you know of any European company that made such machines? A. We knew of European companies that made this machine or that machine or some other machine, but not a complete line of machines that you could move into Hanover and produce Hanover shoes. There never was any such line in existence anywhere, to the best of my knowledge, and our investigations substantiated it.

Q. Your answer is that you did not know any company other than United which made a complete line of machines adapted to your company's use; is that it? A. Or even a fairly complete line, yes.

Q. Weren't you interested in purchasing individual machines, if not a complete line? A. Yes, and we did.

Q. What companies made individual machines, other than United in this period, whose names you are familiar with? A. Well, a great many companies: Adrian & Busch, Albeko, Montreal, Pedersen, Standard, and [205] others that I can't recall at the moment. I'd probably be familiar with them—

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[208] Q. Wasn't the Jupiter stitcher manufactured by Pederson or Peterson? A. Pedersen.

Q. Did you try that? A. Yes, sir.

Q. Did you keep it or reject it? A. We rejected it at that time. Since then—and quite recently—they have revised, revamped the machine, rebuilt the machine. We have one, and bought it, and it is very satisfactory. It is the first one that has done competent, comparable stitching to the Goodyear stitcher.

[209] Q. When was it you first tried the Pedersen stitcher, can you remember, the Jupiter stitcher? A. No, I can't. It was probably 10, 12 years ago.

Q. Did you know it was in use in this country at that time by other shoe manufacturers? A. That's what caused us to try it.

* * * * *

[210] Q. You don't know of any, as you sit here, that were using it when you first tried it; is that so? A. Trying it or using it, please?

Q. That were using it when you first tried it, 10 years ago. A. There were a couple that were trying it. What the result was of the trials, I do not know. I think Freeman was trying it, perhaps, and perhaps Weinbrenner. I don't know with any certainty who they were.

Q. With that date and prior to 1955, did you know of any factories who were actually using the Pedersen stitcher? A. You mean during the period from 1955 to now?

Q. Now, after the date of the first trial by you of the Jupiter stitcher and prior to 1955, did you learn the names of any American factories which were using that machine? A. No, I don't think so. Of course, we had the machine in our plant, we gave it a good trial and rejected it, so anybody else who was using it [211] it would be their business and not ours. I don't recall the names, though.

Q. You rejected it because you considered it was not as good as the United Goodyear outsole rapid lock stitch? A. We were quite sure it was not as good, or we would not have rejected it.

Q. You preferred the United machine? A. Yes.

Q. And you preferred to lease the United machines on the form A rather than purchase them? A. We had no choice if we preferred to lease them.

Q. When you decided to use it you knew you could only lease it? A. Yes, sir.

Q. And you preferred to do it on those terms rather than to purchase the Pedersen machine? A. Rather than to purchase any unsatisfactory machine. We tried several stitchers, several makes of stitcher, and they were all unsatisfactory for our purposes. We have bought since the

last year or so a Jupiter machine which is satisfactory, but we only heard about it, the new Jupiter, within the [212] past year or two.

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Q. And you recollect having been informed that in 1949 Mr. Boyd's company established a plant in Jerusalem for the manufacture of men's welt shoes? A. Yes. The whole industry was aware of that.

Q. The whole industry knew that, didn't they? A. Yes.

Q. From what sources did they get it? A. I don't know what sources.

Mr. Carson: I withdraw that.

A. It was fairly widely advertised.

Q. Did you know that factory was equipped exclusively with machinery that could be purchased, either United machinery or foreign machinery adapted to the manufacture of men's welts and of women's welts?

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[218] A. I don't recall knowing it. I did not mean to be irresponsive in my answer. It would have been of no interest to me if it had, for good reasons.

Q. You say if you had known that it would have been of no interest to you? A. That's right.

Q. Your company, I take it, subscribes to the periodical known as Leather and Shoes? A. Yes, yes.

Q. I show you an article reprinted from that magazine, January 3, 1953, issue, entitled "Shoemaking Miracle in Jerusalem," by Claude M. Swinney, General Shoe Corporation, and ask you if you ever [219] saw it before. A. No, I don't think I have.

Q. Did no one in your organization call this to your attention? A. If they have, I have forgotten it. Of course, this is what Mr. Swinney says.

* * * * *

In addition, did you not receive from United planning service without charge? A. There was a planning service available without charge.

Q. Sir? I am sorry. A. I said there was a planning service; there was a planning service available without charge. At times we discussed planning with them, took some advantage of it from time to time over the years.

Q. And from time to time—the dates I won't bother you with—Hanover Company, to your knowledge, did utilize, without charge, that planning service of United? A. Yes.

* * * * *

Q. Now, just before receipt of that announcement, or a month before the receipt of that announcement dated July 31st, is it a fact that you had a conference at Hanover with my partner, Mr. Kiendl, and Mr. L. B. Walker on or about June 28, 1950, concerning the pending government case? A. Mr. Walker and Mr. Kiendl called on me informally, though I think Mr. Walker called me from somewhere in the vicinity and wanted to know if I would be in and I said yes. He asked if they [251] could come to see me and I said yes. I don't know if I understood what they wanted to talk about.

When they come in it was not unusual for officials of the USMC to call on me when they were in the vicinity or the area, and I did meet with them.

* * * * *

[252] Q. You do recollect that they told you they were interviewing witnesses or possible witnesses in the case? A. Yes, sir.

Q. And you understood, did you not, that you were one of those possible witnesses? A. Well, naturally, if they were looking around for witnesses and saw fit to take their time out to come see me, I would naturally think that perhaps I might possibly be asked to act as a witness.

* * * * *

Q. Can you remember anything that was said in that interview? A. The reporting of the interview is so—I don't know what. It is just—it touches, and only touches, on a few things that sound right to me.

Q. Just tell us what you remember. A. I think that we—probably I did—discussed in the form of a gripe or complaint, if you will pardon the word—I think I touched on the fly-by-night outfits that the USMC set up in business which only cause chaos and confusion in the area, but that's been a pet peeve of mine for a long time.

I remember that I probably said that we could not make shoes without United, and the important thing in manufacturing is the continuity of operation.

* * * * * *

I touched on the old Colonel King incident, where I was young and brazen enough to refuse to sign certain leases connected with clicking machines.

Q. Now, what was your incident with Colonel King about the leases on clicking machines? A. About 1921, or early 1922, United came out with some new form of lease in connection with clicking machines, and in there was a clause which required us to acknowledge that the USMC

owned the dies, which are very expensive—that's a cutting die—even in [258] spite of the fact that we bought the dies, paid for the dies, and this clause was in the lease requiring us to acknowledge they were their dies and could not use them on other machines, and a lot of other foolish things, and I was, as I said, young enough, perhaps stupid enough, to refuse to sign them.

Q. To refuse to what? A. Refuse to execute them.

* * * * *

Q. All right. A. And shortly after that there was a change made and that clause was stricken from the lease. In the meantime I had bought 11 Reece machines, which I mentioned in my testimony before, and that's about the story.

Q. And you told Mr. Kiendl and Mr. Walker this in the interview? A. Yes.

Q. Or something about it? A. Yes; but this was a very garbled report on the part of Mr. Ward.

Q. I take it you told them at length about the Colonel King incident? A. I did.

Q. What else do you remember about the inter- [259] view? You don't have to confine yourself to the memorandum. A. I am looking for the subject matter. I can't remember everything that was covered.

I expressed at that time a general dislike for some of the antitrust suits that had been brought in the past by the Department of Justice and I took a rather dim view of some of them. Again that was before your case was tried; in a manner of speaking, quite a long time ago. This was 12 years ago. I hadn't been too long out of Washington

at that time and was a little sour on some departments of overzealous bureaucracy that took place during the war.

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Q. Now, you had testified that the corporation had a policy of purchasing machines. A. That's correct.

Q. Tell us what Purtell and Cadwell said as to the advantages of carrying certain machines on lease. A. They pointed out more fully than this report shows that it would be not only advantageous for us to purchase some machines almost immediately, which was done, some $550,000 worth, and that we did not purchase in 1955 some $90,000 or $100,000 worth of machines for one reason or another, either we had hopes of some machines other than United developing, that were under test by us, into machines—we weren't through testing on that. There were a couple of instances we did not buy them in their first year because of fear of obsolescence. There [288] was this matter of form B lease facing us, which upped the rentals a great deal, and some of the machines that we refer to here we thought were perhaps not too good a buy.

But the fact remains that within 12 months we did buy them all; and I am sure that is what Purtell and Cadwell meant in this survey: while they urged purchase, they did not urge purchase of all of them.

Q. I have directed your attention to the language in your own company's minutes which says they pointed out it would be advantageous to continue to carry certain machines under lease, and I asked you what they said. Have you told us all you can remember of what they said? A. I have.

Q. You kept telling us what they said in 1956. They didn't say that in 1955. A. No, I didn't.

Mr. Hayes: That is not a correct characterization.

Mr. Carson: I think it is.

Q. Do you remember anything more as to what they said was the reason it would be advantageous to [289] carry machines on lease? A. They didn't say to carry machines on lease, period. They went into detail—not in this meeting—but into detail as to what machines and why.

Q. And you have told us all you can remember of their reasons? A. I told you all I can remember.

Q. They said that the survey showed it would be advantageous to return a number of machines to United and in their stead purchase outright machines offered by other suppliers? A. Yes.

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[318] • • • Q. Now my question, apart from dates, is merely whether you recollect that at the period, whatever it was, Mr. McAllister was advising the Technical Committee on the negotiations with United Shoe concerning the sale prices of outstanding used machinery. A. Yes, sir.

Q. It was, wasn't it? A. Yes, sir.

Q. You had different meetings with him on that subject? A. Yes, sir.

Mr. Hayes: I am sorry. May I have the last question and answer.

(Question and answer read.)

Mr. Carson: I ask for a concession that the document shown the witness entitled "Sales prices for

[319] outstanding shoe machinery, May 7, 1955, prepared by Andrews, Anthony & McLean was filed in May, 1955, in the Government action in the District of Massachusetts, Civil Action No. 7198."

Mr. Hayes: I don't know about it offhand.

It is my present information from Mr. Morten who was in the negotiation with Mr. McAllister that this copy, which I assume is the right one, was filed in the proceedings having to do with the negotiations leading to the termination of the existing leases. I think that was the proceeding, was it not?

Mr. Carson: That was the proceedings. I will take that concession and it may be subject to correction.

I offer in evidence the document just shown the witness and just identified as being a report, as previously described, of 72 pages with five annexes, six annexes.

Now, the document is an entirety and I think it is fair to offer it as an entirety but if there is objection to the bulk, I will limit the offer.

Mr. Hayes: If your Honor please, I object to this document going in evidence as any proof of the truth of its contents. I have no doubt—I [320] know that Mr. Sheppard saw—I believe it is the preliminary transcript or manuscript which led to this Exhibit D-34 for identification. I know that on his pretrial examination he was examined about it and expressed disagreement with certain portions of it. This is in the nature—and I have never had an opportunity myself to read it in detail—of the opinion of an economist.

This is no way, I submit to your Honor, to prove economic testimony. I have no doubt that it was or it is even in final form—certainly in its draft form it was in the hands of the plaintiff in this action. I have no objection to it going in as a document which came to the attention of the plaintiff. I object to it for any other purpose.

The Court: All right, Mr. Carson, what is the reason for it?

Mr. Carson: The purpose is first to establish it as a document which came to the attention of the plaintiff through its president as a member of the Technical Committee in 1955, second to show that the Technical Committee, with the plaintiff's knowledge, espoused the contentions in this document in [321] the negotiations with the defendant, and third, to show that as a result of its espousing these contentions, a document emerged as part of the plan for terminating Form A leases with a discount table of which this plaintiff is taking advantage in this action.

Now I am willing that it should not be received for the truth of its contents. I admit that the contents are subject to cross-examination.

Mr. Hayes: If your Honor please, the second point that Mr. Carson mentioned was that—what was that language you used?

Mr. Carson: It can be read.

(The following was read:

"Second, to show that the Technical Committee, with the plaintiff's knowledge, espoused the conten-

tions in this document in the negotiations with the defendant.")

Mr. Hayes: There is no evidence before your Honor that the Technical Committee did engage in such espousal. This is merely the report filed in court on behalf of the National Shoe Manufacturers Association and individual members of the Technical Committee may have had all sorts of varying reactions [322] to the contentions advanced by Mr. Anthony and there is no proof to the contrary, and as Mr. Carson knows, Mr. Sheppard on deposition testified flatly that he disagreed with some of the contentions, at least and specifically the cost of capital, one which was advanced by Mr. Anthony in Plaintiff's Exhibit D-34 for identification.

The Court: Mr. Carson, is there anything in there to show that the Technical Committee did espouse this report?

Mr. Carson: Yes, the offering letter, April 27, 1955, states that the report embodied the factors that the committee authorized for use as a basis for negotiations with United on the prices of outstanding machines.

Mr. Hayes: That does not say they espoused it.

Mr. Carson: I am treating that as an espousal.

Mr. Hayes: I don't think the language says that, Mr. Carson.

Mr. Carson: It states:

"Copies of the report will be handed to United's counsel today. The points of law [323] in the report . . . are statements of the views of counsel

for National Shoe Manufacturers Association" who happen to be counsel for Hanover today.

The Court: All right, we will admit it. You will be protected, Mr. Hayes, on the record.

Mr. Hayes: You mean it is admitted for all purposes?

The Court: Not for the truth of the contents. He said he does not want it for that.

Mr. Hayes: How about the opinions that are in here?

Mr. Carson: I am not stating the opinions as evidence in the case, but I am stating the opinions and their bearing on the negotiations and on the terms exacted from this defendant as a factor in the issues between Hanover and United.

The Court: As I understand it, it is not the truth of the contents, but it refers to the facts that you stated in your first three reasons, or in your three reasons you stated certain facts.

Mr. Carson: Yes.

The Court: Not the truth of the report.

Mr. Hayes: And as I understand, not the [324] validity of any of the opinions.

* * * * *

[387] * * * Q. With reference to the United lease only machines, take the years 1940 or 1950 as examples, isn't it a fact that you could not make a business decision whether to lease, continue leasing those machines, or to purchase those machines if available for purchase until you knew what the price of those machines was as fixed by either United or by some Court? That is obviously

true, isn't it? A. I don't know that it is so obviously true, sir, because you had some optional machines which we declined to buy because we, in our opinion, thought they were priced too high.

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Q. [389] • • • Isn't it the fact that in all the years that you knew the management of United Shoe, whose names you gave us yesterday, you never once asked any one of them gentlemen for the right to buy any of the machines that were on lease terms only? A. I don't know whether anyone ever asked them or not. I don't think I ever did.

Q. You never did. And you were the president since 1940, weren't you? A. That's right. It would have been sort of a foolish question, wouldn't it?

• • • • •

As you sit there, as chairman of the company, wouldn't you admit yours was one of the most prosperous, if not the most prosperous? [391] A. Not quite. It was among the most prosperous.

• • • • •

". . . Q. Can you say whether or not your company, before 1955, purchased from United Shoe all of its machines available on optional terms for purchase or lease? A. Yes. I can—" then there is an interruption.

[2316] "Q. Which were adapted to the operations of your company? A. Yes. I can say we did not.

"Q. You did not? A. No.

"Q. Now, am I correct in my recollection that you previously testified that your desire and your purpose was to buy all the machines that you could rather than lease

them? A. Yes; you are correct as a general statement.

"Q. Can you state any reason why in those circumstances you did not purchase all the machines available to you on optional terms? A. There I think you'll have to be more specific as to what machines you're talking about, Mr. Carson. There are different reasons why we did not buy certain machines.

"Q. Can you state any of the reasons? A. Yes. They're priced too high; it would take too long to pay for them based on the rental and royalty—rental, not royalty, that was being charged for them; they were low-cost machines and would perhaps take ten years to pay for in some cases, and in some instances there were either rumors of or actually had later models [2317] come out to supersede the models that were offered. So—

> "Mr. McAllister: To clarify that answer, when, Mr. Sheppard, you referred to them as low-cost machines, what did you mean?
>
> "The Deponent: Low cost as to rental.

"By Mr. Carson:

"Q. That is, the rentals seemed to you low as compared with the sales price? A. That's right. I think we could have bought some edge trimmers for a good many years, but when I first became aware of that privilege, a new edge trimmer had taken its place, which was superior to the old one."

* * * * *

[2320] "Q. What you have there, Mr. Sheppard, is a list which I am informed by the defendant could have been bought during this period, and I am only asking you to

determine, tell us which of those you knew about as being available. Now, have you finished your answer? A. Yes. I have about finished it. I am afraid it isn't satisfactory, but I can only answer your question this way, that I knew there were ten or a dozen machines, types of machines, different types of machines, that could have been bought, and that over a period of years I have examined one or more of them a number of times, and we decided not to buy them for the reason I have previously stated."

* * * * *

[2326] "Q. Were you aware before 1955 of any American shoe manufacturers who operated exclusively on foreign-made machines?

"Mr. McAllister: Now, what kind of a machine?

A. I can answer that question if you will frame it just a little different.

"Q. How should I frame it? A. Were operated exclusively with machines other than United machines.

"Q. Well, I was directing myself to machines of foreign manufacturers. Let me mention the Williams Shoe Company in Portsmouth. A. Well, that is what I had in mind, exactly.

"Q. Now, what was the fact about them? A. Well, I don't know. I was never in their plant, but I understood that they were operating without a single United machine in the plant, and that is why I asked you to reframe your question."

* * * * *

[2331] "Q. Since 1922 you say you have been interested in buying shoe machinery? A. Yes, sir.

"Q. As far as you could? A. Well, I didn't answer yes to that one, your addition to the question, as far as we could do it advantageously and worth while.

"Q. In other words, you didn't have a policy of buying any and all shoe machinery but only such as you could buy advantageously? A. That is right, with one minor exception. I didn't bear down or insist too much on some of the little inconsequential 'pinky-doodle' machines that bore a very small relationship to our royalties and rentals total."

Mr. Carson: Page 40, second question from the bottom. There had been previously a discussion of tie-in clauses in the Twenties which are dealt with in earlier litigation.

"Q. I want to be sure your testimony is clear. Apart from what you call the tie-in clauses, do I correctly understand that it was your wish and policy to purchase all important machines that you could purchase advantageously, is that correct? [2332] A. That is correct.

"Q. What did you mean by saying 'purchase advantageously'? How did you determine what was advantageous? A. Well, first you determine the quality of the machine, the quality of work the machine produced and the ease of operation and the lack of trouble with the machine. Then you looked at it from the economic standpoint, and if you could get a good return on your investment, it was another criterion as compared to the lease rental contract.

"Q. Were those the only factors that you took into account in deciding what would be an advantageous purchase? A. I don't know what other factor there would be to consider.

"Q. Now, as far as the first one of quality is concerned, that would apply on the question whether you would lease a machine also, wouldn't it? That is, you wouldn't want to either lease or buy a machine that didn't give you the quality you wanted? A. No, that is correct.

"Q. So really the determinative factor in deciding whether or not it was advantageous to buy your important shoe machinery was the second one, wasn't it, [2333] getting a good return as compared with the lease charges? A. That was one of them. Another one was in sturdiness of the machine as to whether you were buying a constant repair bill on it for parts and other things. And another one was the ease of operation on the operator himself.

"Q. Well, ease of operation would apply equally to whether you lease it or buy it, wouldn't it? A. Well, yes, it would.

"Q. So I am just trying to isolate the factors, Mr. Sheppard, which determined in your mind that a purchase was advantageous. As I understand, it is a matter of the good return and the sturdiness of the machine. Are those the factors? A. Well, they are most of them, I think.

"Q. Can you think of any others now that you applied in deciding whether you wished to purchase a machine in the past? A. Not offhand I can't. There was a certain fear for a period of time in purchasing a machine—it was rumored—I suppose it happened at least once or twice—that you might be buying a lawsuit from United in those earlier years.

[2334] "Q. That is, patent infringement? A. Yes, sir.

"Q. Did you give consideration to the danger of obsolescence of a given machine type in deciding whether the purchase was advantageous? A. Yes, we certainly did.

We did that in the purchase of U. S. M. C. machines, found out in one instance that we were very well justified in doing it.

"Q. Which instance was that? A. In the instance of the edge trimmers.

"Q. When did that occur? A. Well, it started way back, some time probably in the Twenties. We owned all of our edge trimmers at one time, Model F, and then we started to buy some Model H's, and it was a superior machine to the Model F. We also continued to lease the Model H's, and then about the time Model L came out, and it is my recollection we quit buying the H's, which was an improved machine doing the same work.

"Q. Was the Model L better than Model H for your purposes? A. United said it was better.

Q. What did you think? A. It was a more modern machine, had some improve- [2335] ments in it. But the fear of obsolescence always entered into our consideration of purchasing any machine, whether it be from United or from somebody else, in an expensive machine.

"Q. All these considerations applied to purchase from all sources, not only United, didn't they? A. Certainly.

"Q. So now do we have four factors which determine the advantageousness of purchase in your mind, namely, the good return as against the cost of leasing, the sturdiness of the machine, the possibility of a patent infringement suit in a few cases, and finally the fear of obsolescence? A. They were the major ones.

* * * * *

[2338] "Q. So from your present point of view you would say that a number of machines were leased by your company from various suppliers which in accordance with

your policy should have been purchased. Is that what [2339] you are saying? A. No, I did not say that.

"Q. Well, did I misunderstand you? A. No, I don't think so. There are other reasons. In some instances the machine wasn't worth purchasing. The gain to be had from owning the machine was not worth purchasing. In other instances, in many instances, there was fear of obsolescence where we had heard about a better machine coming out, either being put out by United or somebody else, and the amount involved was not worth a great deal of discussion, a great of thought. We waited to see.

"In some machines the improved machine came out either by United or a competitive manufacturer, and in some instances it never did come out.

"Q. Well, those instances you have described are instances where it would be your own policy and program to lease rather than to buy the machine for the reasons you have stated, aren't they? A. I don't think so, unless you are talking about an individual machine. There is no use to buy a machine that you feel is going to be obsolete in a year or two.

"Q. Haven't you already said that where there [2340] was fear of obsolescence your policy was to— A. To postpone—

"Q. —was to lease the machine and not buy it? A. To postpone the purchase.

"Q. So that where your superintendents did that, it was in accordance with your policy? A. That is right.

"Q. Was any program or policy of your company with respect to the mode of acquiring shoe machinery ever stated in writing? A. No, not to my knowledge, I don't think so.

"Q. How is the policy or program that you have been describing manifested? A. Word of mouth. We had very, very few intercompany memoranda."

Mr. Carson: Page 55, first question:

"Q. Now, in your answer previously as to the way you would determine the advantageousness of purchasing you referred to the existence of a good return on the purchased machines as compared with the leased terms— A. Comparative, yes.

"Q. How would you determine and decide that there was a good return? [2341] A. Took the figures and looked at them.

"Q. What standards or formula did you use? A. No formula.

"Q. What items of cost did you take into account? A. The cost of the machine that we were considering purchasing, the royalties and rentals on the machine we intended to replace with that machine, and this can't be called a formula but approximately how long it would take to pay, for the competitive machine to pay for itself, or the United machine on purchase to pay for itself. If it looked pretty good, we bought it. If it didn't we didn't.

"Q. What term of years did you use to determine whether the accumulated rentals and royalties looked pretty good in comparison with the sale price?"

Mr. Carson: Off the record.

(Discussion off the record.)

Mr. Carson: Then the answer was: "I didn't get the last two or three words."

The question was reread.

"A. What term of years did we take?"

Mr. Hayes: That is the answer.

Mr. Carson: Yes, "A. What term of years did we take?"

[2342] *"By Mr. Carson:*

"Q. Yes. A. We didn't have an exact measuring stick but if it looked like a machine would pay for itself, say, in five years as compared to the royalties and rentals or rental that we were then paying, we would buy it probably unless—and I wish to make this point clear—if the competitive machine was inferior to the United machine, and inferior machine either in construction or ease of operation or the work, the actual work it did on the shoe itself, we wouldn't buy it, regardless of cost.

"Now, in the case of buying or leasing a United machine, there fear of obsolescence or rumor of a new machine either by United or some outside producer, we would hold off, sometimes hold off quite a while.

"I was amused in one of the exhibits you showed me where back in 1950 on our tour through Beverly they were then planning on standardizing heel seats and made a good deal of progress, which then would influence a lot of machinery, particularly in the lasting room, like the heel seat laster and other machines. Now, that has not materialized as yet as far as I know, and it has been ten years.

[2343] "That alone would retard one from buying a machine similar to the United machine if more automation was in sight, and we were told that it was in sight. But that was ten years, eleven years ago, and it has not arrived. I don't say this in a critical way; I simply say this from an investment standpoint in purchase.

"There were other minor things that have been talked about. You know there are not very many secrets in the shoe trade between the manufacturers and the branch managers or the district offices. While it might not be absolutely accurate as to timing, and so forth, there are a good many tipoffs, food for thought, or rumor, or what have you that you are aware at the moment."

• • • • •

"In 1956, to the best of my recollection, we cleaned them all up, all of these questionable machines, I mean in our own minds, and bought them, and I have just forgotten what that purchase amounted to, but I don't think it was—I am only guessing—around $75,000.

"What was it, Paul (addressing Mr. Spears)? [2388] May he tell me? I think he knows."

Mr. Spears said $93,000 in June 1956.

"The Witness: $93,000 in the aggregate."

• • • • •

[2396] Mr. Carson: Page 38:

"Q. Did Hanover purchase all the machinery adaptable to your process that it could purchase prior to 1955? A. I wouldn't say they did, no.

"Q. Why not? A. Well, there may not have been any advantage in purchase for one thing.

"The majority of the machines that we have been talking about, again I say, were inconsequential machines more or less, not the fundamental machines. But we may not have liked the machine. There are a number of reasons. The same applies to not purchasing some of your machines that were offered on an optional basis.

"In many instances there was not much financial advantage or savings to the company in buying that small type of machine as long as you couldn't buy the major machines. Occasionally some little machine would come along that would attract you and if you liked it, you bought it. But there were no lines in those days of shoe machinery in this country. The lines didn't become available until after the court decision or just prior to it."

• • • • •

[502] *By Mr. Hayes:*

Q. Mr. Spears, do you have records and can you tell us how many of the lease only machines of the 20 major types which were in the Hanover factory in 1955 prior to the time of purchase were later returned to United without any replacement being made? A. I have some work papers that I could read.

Q. All right, will you get them.

(Witness produces documents.)

A. Prior to the time of the purchasing of this shoe machinery by Hanover in 1955, there were 154 machines included in the 20-machine type group. Hanover, between 1955 and 1961 purchased 133 of these machines included in the 20-machine type group and we returned [503] 20 machines that were included in the 20-machine type group.

Q. And you returned 20—and I missed what you said after that. A. We returned 20 machines that were included in the 20-machine type group.

• • • • •

[517] Q. Now from your records will you tell us what happened with respect to the—whatever the number was—of United machines which were in the Hanover factory prior to the 1955 records? A. Yes, sir. May I get my papers?

Q. Oh, certainly. Sure.

(Witness produces documents.)

A. There were 306 machines in the factory—

Q. Pardon me, just a second. Do you need this? A. Yes, I would need that. There were 306 machines in the factory.

Mr. Carson: When?

The Witness: Prior to the purchase, Mr. Carson, and I believe they were listed on PS-4, I believe, during my deposition.

Q. That was part of Defendant's Exhibit 33 for [518] identification. A. Thank you. Out of those 306 machines, the Hanover Shoe purchased from 1955 up to the present time 266 of those machines. They returned 39 of them and there is still one machine remaining on lease from United.

Q. Is that the outsole rapid lockstitch that Mr. Sheppard mentioned yesterday in his testimony? A. Yes, sir, that is a spare machine, as I understand it.

Q. Now, can you tell us by dates or by years, or generally, when the purchases were made, what years or anything that you did make? A. Well, there were two major purchases. In 1955 there was one large purchase made in October when the company purchased 205 machines,

and there was another large purchase made in June of 1956 when there were 47 machines purchased.

Q. Were there any machines purchased between 1955, September, October, or whatever it was, and June of '56? A. Yes, sir, there were some small purchases, just stragglers.

Q. And what was the total that had been purchased by June of 1956? [519] A. There were 211 machines purchased from the large purchase in June of '56.

Q. 211, and how many do you say there were purchased in June? A. In June of '56, another 47.

Q. That would be 258 were purchased by June of '56? A. Yes, sir.

Q. Were there any United machines purchased after June, '56? A. Yes, sir.

Q. How many? A. Eight.

Q. Could you tell us the years in which they were purchased? A. There were three purchased on August 4, 1956, there was one purchased on September 10th of 1956, another one purchased in October of '56, another one purchased in November of '56, and there were two more machines purchased in 1960, one of them in October and one of them in August.

Q. So of the total number of machines purchased, all but two were purchased by the end of 1956; is that correct? [520] Yes, sir.

Q. And the other two were purchased you say in 1960? A. Yes, sir.

Q. Now, of the machines returned, how many were returned? A. There were 39 returned.

Q. I am sorry? A. 39 machines were returned.

Q. And when were they returned? A. There was one returned in July of 1955 that was on that list. There were another 19 machines returned on September 10, 1955. There were five more machines returned on October 29, 1955, there were 10 machines returned on February 1, 1956, there was another machine returned on May 15, 1956, and three more machines were returned in 1960, one in March, one in June and one in August.

Q. Those are the total returns? A. Yes, sir.

Q. And just the one machine that was on lease during the period, Form B lease? A. Yes, there is one machine on lease at the end of the period.

[521] Q. That was the machine you received in 1954, if I remember rightly, is that correct? A. I believe it was shipped toward the end of 1954, yes, sir.

• • • • •

Q. Now as to the 3 machines returned in 1960 at different dates, do I correctly understand that they had been held by your company just before the return of each on Form A leases?

Mr. Hayes: Could I have that question again? (Question read.)

[522] Q. Is that right, Mr. Spears? A. You are saying they are asking me whether or not they had been held on Form A leases?

Q. Whether they were on Form A leases at or just before their return. A. Oh, they had been on Form A leases.

Q. So the fact is then that until these different dates in 1960, your company continued to retain the three machines on these old Form A leases? A. I believe that—

Q. To pay rentals, or whatever it was? There are three machines, did I say two? These three machines, on the old Form A leases, and to pay the stipulated rentals or royalties as called for by the leases? A. Yes, sir, I believe that's right.

Q. And I take it the same would be true with respect to those which you testified were returned at different dates from July, 1955, to May, 1956, when returned and just before they had been on Form A leases? A. Yes, sir, that's right.

Q. Certain of the machines which were considered for purchase in 1955 were converted to Form B leases by the company, were they not, without going into the numbers? [523] A. I believe so, yes, sir.

Q. And the Form B lease it has been said here generally carried somewhat higher rates and somewhat different provisions? A. Yes, sir.

* * * * *

[1208] CHESTER WARD, called as a witness on behalf of the defendant, being duly sworn, testifies as follows:

Direct Examination by Mr. Carson:

Q. What is your residence, Mr. Ward, please? A. Spartanburg, South Carolina.

Q. You are a member of the South Carolina bar, are you? A. Yes, sir.

Q. Are you a member of any other bars or courts? A. I am a member of the New York bar and of the Federal District Court, Southern District of New York, United States Supreme Court, the Western District of South Carolina and the Fourth Circuit Court of Appeals.

Q. Were you at any time associated with my firm, Davis Polk Wardwell Sunderland & Kiendl? A. Yes, sir, I was from November 17, 1947 to I think approximately September, 1950.

[1209] Q. Did you at that time attend at an interview with the president of Hanover Shoe, the Hanover Shoe, Inc., namely, Mr. Lawrence Sheppard? A. I did, sir.

Q. Where did that occur? A. It occurred in Hanover, Pennsylvania.

Q. And at what place in Hanover? A. At the office of Mr. Sheppard.

Q. Were Mr. Sheppard and you present? A. Yes.

Q. Who else was present? A. Mr. Kiendl of Davis, Polk and Mr. Walker, and possibly another gentleman, I am not sure about that. I know that those people were present.

Q. How long was the conversation? A. I would say about an hour and a half.

Q. Can you just tell the Court without giving us the substance of conversations with anybody else how it came about that this interview occurred; what was your objective? A. Well, Mr. Kiendl and I, and Mr. Walker, made a trip through New York, Pennsylvania and Maryland to interview approximately twelve top executives of various shoe companies, the purpose of which was [1210] to ascertain whether or not these individuals would be willing to testify for United Shoe Machinery Corporation in a then pending antitrust suit brought by the United States Government and, of course, to determine whether or not it would be to our advantage to have these people testify, providing they were willing to do so.

Q. And Mr. Sheppard was one of the persons so interviewed? A. He was.

Q. Now, during the conversation did you take notes? A. I did.

Q. Tell us in what form, in what way you took notes. I am directing myself as to whether other people could see you or whether this was done so that they couldn't see. A. Well, I had a yellow pad comparable to the gentleman sitting over there, typical legal pad.

Q. This kind of 8 by 11 legal pad? A. Yes. And I had it on my knee, and I took notes comparable to the gentleman there taking notes, and anyone that had normal vision could certainly see me do it. No effort in any way to hide it.

[1211] Q. After the conversation was over, what did you do with your notes? A. I put them in my briefcase, and didn't look at them again until I got back to New York.

Q. After that did you change them to any other form? A. Yes, I then, as I had done in all the other interviews, wrote memoranda of the interviews and submitted them to Mr. Kiendl, who was my superior.

Q. And you submitted such a memorandum of the separate interview, did you? A. I did.

Q. I show you D-25 for identification. Is that the memorandum? A. Yes.

Q. You see it bears on the first page the date June 28th. Was that the date of the interview? A. Yes, sir.

Q. What year? A. 1950.

Q. Now, first let me ask you as to the scope of your memorandum which I note is four pages. Did you purport to set down everything that was said? No, sir.

[1212] Q. In what way did you attempt to represent the conversation in your memorandum? A. Well, I tried to take down everything that was said that was pertinent to our inquiry. Obviously if a conversation goes for an hour, hour and a half, a lot of it can be repetitious, extraneous to the point at hand and have no particular significance to what we were trying to do, so if we got into one of those lapses in conversation that had no bearing on what we were after, I would, of course, not bother to copy that down.

I only took down the things that had reference to what we were there for.

Q. Did you put down in your memorandum everything that you thought was pertinent concerning what Mr. Sheppard would say as between the parties in the Government case? A. Yes.

Q. When you made your memorandum, did you attempt to make it as accurate as you could? A. Absolutely.

Q. Is it or is not, according to your recollection, an accurate statement of the conversation in Mr. Sheppard's office? [1213] A. Yes, sir, it is accurate.

Q. There has been some testimony in this case that Hanover Shoe had a policy of purchasing shoe machinery. Was anything said in the conversation by Mr. Sheppard to that effect? A. The only time that I can remember the question of leasing against purchasing coming up was in regard to the Colonel King incident, and I think as I state over here—

Q. Are you referring to the bottom of page 3 of the memorandum? A. Is that where it is? Yes. Mr. King—I mean Mr. Sheppard made it very clear to us that he was his own boss, and that he had established that policy when

he was quite young in so far as United Shoe is concerned, and that after he had more or less got that settled that therefore he was a free agent, so to speak, to purchase or lease as he saw fit. He had been the man to call the shots.

Q. Was anything else said that you can now remember by Mr. Sheppard concerning the Form A leases of the United Shoe or the leasing policy of United Shoe other than what appeared in your memorandum? [1214] A. Nothing other than what appears here, Mr. Carson. This again was intended to be a summation for our purposes to reflect his attitude as to whether or not we would call him as a witness if we needed him, and it is very clear in my mind, I remember the conversation very vividly, that Mr. Sheppard was very pro United Shoe, and the only thing about the leases which he didn't like was the fact, as I said there, it allowed what he called every fly by night person to get into the business and he objected to the fact that it allowed competition to hurt him.

It wasn't that he objected because he had the lease; he objected because United let others have machinery.

Q. Now, Mr. Ward, you appreciate I am trying to call for the substance of what was said. Are you repeating the substance as nearly as you can of what he said on that subject? A. Yes, I am. Yes, I am.

Q. I previously directed your attention to whether or not anything was said by Mr. Sheppard to the effect that his company had a policy of purchasing shoe machinery so far as it could. Was anything [1215] said? A. I have to refresh my memory on that.

Mr. Hayes: Will the record show that the witness is referring to—what exhibit is it?

Mr. Carson: D-25 for identification.

A. The only thing I can say in answer to that, Mr. Carson, on page 3—as to suppliers, we buy from whoever we wish and nobody can dictate to us——

Q. Well, that is in the memorandum, Mr. Ward. A. Yes.

Q. I am just calling your attention to something that I do not myself find in the memorandum, namely, whether he stated that Hanover had a policy to purchase shoe machinery, that it desired to purchase rather than to lease. A. I can't ever remember him saying that.

Q. Did anyone in the meeting ask Mr. Sheppard if he would testify on behalf of United in the pending Government case? A. Yes.

Q. What did he say? A. He said he would, if he wouldn't have to hang around the court house too long. He says—"I'd be delighted to testify on behalf of United—"

[1216] Mr. Hayes: May we say the witness is now reading from the exhibit.

You are reading from Exhibit D-25, the exhibit? A. Yes.

Q. I take it from the substance of your testimony that that is your best memory? A. Yes.

Q. There is a statement in the memorandum that any Government charges that United controlled shoe manufacturers in any way is a lot of nonsense. Who said that? A. Mr. Sheppard.

Q. Can you remember any more details that he said on that subject? A. I think he spent about forty-five minutes or an hour of that, hour and a half interview, on that very point.

Q. Tell us the substance of anything else that he said that you remember other than this one sentence. A. Well, he had just come back—I don't say just come back but it was still fresh in his mind of an experience he had had in Washington, and he was [1217] very, in my opinion, bitter at the way the Government was trying to run business and he—

Q. That is what he said, is it? A. Yes. And that he was sounding off that this case against United Shoe was a little example of Government interference in the conduct of business, and he elaborated at great length on that.

I didn't see any point in putting every sentence down because the theme was still there, that's his business.

[1218] Q. How about United's controlling shoe manufacturers, what did he say about that? A. He very definitely said that was not true, and that is how the Col. King example came in. That was particularly true with reference to supplies. That is where that question comes in, where he says about supplies, and he also mentioned in there, as I recall it, about the machine that he had purchased and they claimed it wasn't his and he claimed it was his and he won. I think it had something to do with the dies.

Mr. Carson: I offer D-25 for identification into evidence.

Mr. Hayes: I object, your Honor. The witness is here to testify.

Mr. Carson: He said this was a memorandum that represented an accurate statement.

Mr. Hayes: The witness is here, your Honor, and let him testify as to his best recollection.

The Court: Let me see that, please.

I think we will take the testimony of this witness. He may refresh himself with D-25, if he wishes.

Q. All right, Mr. Ward, using D-25 for [1219] identification to the extent you need to do so, will you tell us in full what the conversation was as regards the purpose for which you testified—withdrawn.

Tell us in full what the conversation was.

* * * * *

A. The only way I know how to get into it is to say—I did not participate in the conversation. All the conversation took place between Mr. Kiendl, Mr. Walker and Mr. Sheppard. All I did was—other than shaking hands and the usual amenities, I did not participate. I was there to take down the information and to record it in memorandum form. As [1220] I recall it, I think Mr. Walker started out—I think he knew Mr. Sheppard and I think he more or less set the stage for the interview and then after Mr. Sheppard was apprised of the purpose of our being there, Mr. Kiendl.

Q. You said Mr. Sheppard was apprised? A. Yes.

Q. Can you tell us the substance of what was said? A. I can tell you something: Mr. Walker told him that Mr. Kiendl and I were from the law firm of Davis, Polk, that represented United Shoe in this case, along with Choate, Hall & Stewart, and that we had been asked to interview some ten or 12 shoe manufacturers in the New York-Pennsylvania-Maryland region and that we wanted to talk with Mr. Sheppard about his availability as a witness and about his feeling as a shoe manufacturer and a customer of United about the specific charges the government had charged in the complaint against United.

So, then, after that little preliminary thing was over Mr. Kiendl took over and began to get into the purposes at hand.

I note in the first paragraph here that [1221] Mr. Sheppard gives his background, so that leads me to believe, and I can remember the general form of these interviews were that we would first get the man's background. That is for the purpose of our being able to assess his standing, you might say, in the industry, because, after all, we interviewed some very big people and some very small people—

Q. Excuse me. I am going to ask you to confine yourself to the conversation. What did he say about the background? A. He stated he was president of the Hanover Shoe Company—

Mr. Hayes: May it appear that the witness is now reading.

Mr. Carson: He has a right to refresh his memory.

Mr. Hayes: I would rather have his testimony than have him read that.

Mr. Carson: I am going to ask the witness to detail the full conversation using D-25 as much as he needs to and if each time he looks at it Mr. Hayes wants to comment, that is all right with me.

The Court: All right.

A. I can come close to it without even reading. [1222] I couldn't remember after 12 years whether he was chief or assistant chief of the shoe division, WPB. It says here he was chief. He says he was Deputy Director of the WPB; Deputy Director of leather and shoes, WPB. At

present—this was in 1950—he said he was a member of the technical committee of the National Shoe Manufacturers Association.

Mr. Hayes: May the record show that all of that was read by the witness from D-25?

Q. Will you proceed with your answer, please? A. Yes. Then we went to the next question, as to whether he would testify or not. If he wouldn't testify, then there was no point in our staying there.

Q. That wasn't said, was it? A. Yes, I think we told him that was the purpose of our being there, to obtain witnesses or possible witnesses for the shoe case and at the very outset he stated that he would testify in Boston if he were not required to hang around the courthouse too long.

He stated that he had several pressing engagements and we could not give him the exact time of trial. We estimated when we thought it might come to trial and told him so—Mr. Kiendl did the [1223] actual discussion—and Mr. Sheppard then said he would be glad to do so.

Then I recall Mr. Sheppard—we would take down what he said because he would go into various sidetracks on the government and I think the more he thought about the government the more he became convinced and several times stated his willingness to testify and I don't necessarily remember the order in which these points were taken up, but I can tell you what the points were, because I remember the case; One of the things that Mr. Kiendl asked Mr. Sheppard about was about the question of leasing, whether or not Mr. Sheppard objected to leasing machines from United, and that was how he got into the discussion—in

substance, he said, "The only objection I have to leasing is the fact that you lease to everybody."

Then he said that the Chamber of Commerce there in Hanover would try to bring new industry in there and they would give some new person a free plant, something like that, and then he said United would come along and by giving them the machinery it would allow fly-by-night outfits to come in here and upset his labor market.

That is what he didn't like, because it [1224] enabled them to take away from him his key employees and he used the words "fly-by-night outfits" several times—he said they wouldn't survive and in the meanwhile his business would be interrupted and it would cause not only dislocation to him personally but hurt the community and his big objection against the leasing system was that it caused too many competitors for his company.

Then we went to the question of supplies and he said he bought from whoever he wanted to and he got into the question of the Col. King incident and stated when he was quite young that he had, as I recall it, bought or thought he bought some machine or some part of a machine and later on learned that he had not.

I will refresh my memory on that—yes, sir, parts. Any how, he refused to sign the lease, he said, and said when he bought that part he didn't own it and I think that he said he was successful in his fight with United and thereafter had no trouble with them and that he had also been on good terms with United and he felt that the government case had no substance to it—another example of government trying to harass business, he said, and that he [1225] would testify.

Q. You made some reference to the statement about parts coming in; have you told us in your prior testimony what he said about parts or what anyone said about parts? I think you mentioned something about parts. A. Yes.

Q. Does that cover it? A. Well, let's see—"Any government charges that United controlled shoe manufacturing in any is a lot of nonsense."

Q. Is that what he said? A. Yes.

> "As to supplies, we buy from whomever we wish and no one dictates to us; this includes United. We take tacks and eyelets and we buy from many sources other than United. In fact, I doubt if we buy any from United at the present time. I know we don't buy our dies from United."

Q. You are reading now? A. Yes.

> Mr. Hayes: The part with "a lot of nonsense" was all reading?
>
> The Witness: I remember that very [1226] distinctly, that those were his words. Mr. Sheppard was very forceful and colorful and I have a very vivid recollection of those being his words.

Q. Have you told us all you remember him saying about charges that United controlled shoe manufacturers? A. Yes. That was the substance. He expounded at great length on a great many of those things. We let him talk. He liked to talk and we let him talk.

Q. You have mentioned several times what was said in the conservation about the government case. A. Yes.

Q. Were any statements made to Mr. Sheppard or by Mr. Sheppard as to what the government case was about?

A. Yes. Mr. Kiendl outlined to him the basis of the charges, taking each one, starting with the leases, and then ending with the question of supplies. Those were the two big issues insofar as Hanover Shoe could help us, the leases and the supplies.

Q. Can you tell us anything more than Mr. Kiendl said to Mr. Sheppard in that connection? A. I do know that Mr. Kiendl explained to him [1227] what the government's case was about and in doing so he told Mr. Sheppard enough so that he would have a layman's view of the case. This was, I think, toward the end of our trip and we had gotten our format down pretty well as to how to approach each witness and I remember vividly how that was handled.

Q. Did Mr. Sheppard make any comments on the government's case other than what you have already stated? A. No—other than saying the same things in different ways.

Q. Was anything stated by Mr. Sheppard concerning the machinery repair or maintenance service of United under the leases? A. I will have to refresh my memory.

Q. You are looking at D-25? A. Yes.

Q. Did you remember anything without looking at it? A. Yes. My memory is that he said it was quite good and very efficient and they couldn't do without it, but now I will check and see. That has been over 12 years and it is hard to remember a lot of these things. Yes, it says that.

[1228] Q. Is your memory refreshed on that subject? A. It is just as I said: He said he couldn't make shoes without United because of the continuity of operation that was so vital to a shoe company and because United had so many good road men and were there so quickly that

he was relieved of any of the worries about continuity of operation.

Q. Continuity of operation, did you say? A. Yes. If a machine breaks down and you have to wait eight, ten, 12 hours to have someone fix it, you have lost that much production. That is one of the big, strong points he made about United.

Q. On that subject did Mr. Sheppard express any resentment or objection or opposition to that situation? A. Oh, he thought that was wonderful. He said that was the only way that he could stay in business.

Q. Was there any discussion in that conversation of the amount of rents and royalties that Hanover Shoe paid to United? A. Yes, sir.

Q. Tell us the substance of that as fully as you can. A. I will have to look at the memorandum. We [1229] went into that with him—

Q. Can you remember that independently? A. No, not the exact amount without looking here. I know it is on here.

Q. All right, refresh your memory and tell us what was said. A. He said that he paid roughly 11 cents per pair to United in the rents and royalties and he said he didn't know what the cost of the cartons or the fillers would be. He said that his shoes then retailed at $7.95 and he used to sell before the war at $4 and he said that he would like to get by with paying as little as possible but he didn't think that the rents and the royalties were excessive in view of the fact that everything else had gone up. That is why he gave the example of his own shoes having risen from $4 before the war to $7.95 after the

war. He said that United charges had not gone up any more in proportion than other things had gone up after the war.

Q. Did he make any comment on the machinery investment by United A. I will have to refresh my memory on that. From the memorandum here I see that he did.

Q. What did he say? [1230] A. He stated that in view of the fact that United has such a tremendous investment in shoe machinery that obviously the amount of return they got had to be commensurate with the investment and that in that light their rentals and royalties were not excessive.

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[1298] JOHN J. CORSON, called as a witness on behalf of the defendant, being duly sworn, testifies as follows:

Direct Examination by Mr. Carson:

Q. What is your business or profession, Dr. Corson? A. I have been engaged for some years in advising business enterprises and governmental enterprises on problems of economics, marketing, finance, personnel administration and organization.

Q. You practice as an individual or are you associated with a firm? A. I am a director in the international firm of McKinsey & Company.

[1299] Q. How long have you been associated with McKinsey & Company? A. I have been associated with McKinsey & Company for twelve years, and for most of those twelve years I was manager of the Washington office.

Q. How long has McKinsey & Company—withdrawn. What is the business of McKinsey & Company? A. McKinsey & Company is a firm of management consultants that advises business enterprises and governmental agencies in the fields that I have mentioned.

Q. About how long have they been in existence? A. They have been in existence since 1910.

Q. Where do they have their offices? A. We have offices in New York, Chicago, Washington, Los Angeles, San Francisco, London and Geneva.

Q. Would you give us your educational background, please? A. I was educated in the University of Virginia; I received three degrees, the B. S. degree in 1926, the M. S. degree in 1929, and the Ph. D. degree in 1932. All of those degrees were in the field of economics.

[1300] Q. After the receipt of your degrees, by 1932, did you have any further experience in the field of education? A. Yes; in the early Thirties I was the head of the economics department at the University of Richmond. Since then I have been a lecturer or a visiting professor at American University, George Washington University, Columbia University, Cornell University and Princeton University.

Q. Are you now associated with any university? A. I am a member of the faculty of Princeton University.

Q. Do you belong to any professional associations; if so, which ones? A. For most of the last decade I have belonged to the American Economics Association, American Political Science Association, American Society for Public Administration.

Q. Have you written for publication on economic subjects? A. Yes, I have written a good deal; I have written five or six books and monographs, and I have written a num-

ber of articles for such journals as the Atlantic Monthly, American Economic Review, New York [1301] Times Magazine, Nation's Business, Harvard Business Review, Public Administration Review, American Political Science Review.

Q. Have you been employed at any time by the Federal Government? A. I was employed by the Federal Government from 1936 to 1945. In that decade I served successively as the Director of the Bureau of Old Age and Survivors Insurance, as Dirctor of the United States Employment Service, and Deputy Director General of the United Nations Relief & Rehabilitation Administration.

Q. Now, did your activities in these different posts involve the employment by you of your training experience in the field of economics? A. In each of those assignments I was responsible for all activities, but all the activities included in each instance groups of economists, actuaries, statisticians and other analysts for whose work I was responsible for the planning and the direction.

In retrospect I think we were dealing with some economic problems of some substantial national consequence.

[1302] Q. Now, your answer so far has carried us to the year 1945 which you gave us as the end of your employment by the Federal Government.

What kind of work have you done since? A. Since 1945, I have ben engaged in handling problems, economic problems, problems of the analysis of financial investment, industrial relations, organizational problems, for each of two successive employers, the Washington Post Company and McKinsey & Company for most of that time.

Q. Have you recently made studies on behalf of your firm which required economic and statistical analysis and, if so, tell us briefly what they were? A. Well, over the last

few years I have made a great many studies but I can cite four which probably are the most relevant.

For the Sun Oil Company, I directed a study of the distribution of petroleum products and related products. A succession of studies, it turned out to be.

Subsequently for the Columbia Pictures Corporation, I made an analysis of the markets for the distribution of pre-1948 motion pictures for the television market.

[1303] For the Ling-Temco, Inc., I made a study of the desirability and the advantages and disadvantages of the merger with Chance Vought.

For the Southern Railway Company, I recently made a study of the distribution of grain in the Southeast and marketing problems instant thereto.

Each of those, and I cite those as particularly relevant because in each of those the study ended up in my testifying as an economic witness either in a Federal court or before the ICC, the Federal Trade Commission or the Federal Power Commission.

Q. Apart from this kind of work that you personally have done in McKinsey & Company, have you, as a member of the firm, participated in other studies done by that firm which are not under your direct supervision? A. Yes, and a great many such studies are for such corporations as American Airlines, International Business Machines, International Paper Company, Raytheon, Richardson & Merrill, Socony Mobil and a number of others.

[1304] Q. Have you read the complaint in this case of the Hanover Shoe, Inc., against United Shoe Machinery Corporation? A. I have.

Q. Are you familiar in a general way with the issues drawn by the pleadings in this case? A. I am.

Q. In preparing for your testimony in this court have you examined the five computations which were prepared by S. D. Leidesdorf & Company and which are marked as Plaintiff's exhibits in this case Nos. 37, 41, 42, 43 and 46? A. I have.

Q. In connection with these Leidesdorf exhibits have you made your self familiar with the Consumers Price Index and the employment of that index by Leidesdorf in the exhibits? A. I have long been familiar with the index and I have studied its use in these computations.

Q. Have you also familiarized yourself with the discount tables on the sale of outstanding leased United Shoe machinery which are part of the Defendant's Exhibit 35, I believe, on this record, and have you familiarized yourself with the use that Leidesdorf [1305] computations made of these discount tables? A. I have. I am familiar with the tables and I have familiarized myself with the use made of them.

Q. Have you familiarized yourself with the United Shoe Machinery Company's 1955 sale prices, which are Plaintiff's Exhibit 39 in this case, and the use which the Leidesdorf computations made of these prices? A. I have familiarized myself with these prices and I am familiar with the use made of them in these computations.

Q. Would you tell the court what, in your judgment, are the economic factors that a shoe manufacturer should ordinarily take into account and would ordinarily take into account in making a decision whether to lease or to purchase shoe machinery?

Mr. Hayes: If your Honor please, I object. There is no showing here that this witness is qual-

ified to testify as to what shoe manufacturers would or should do.

The Court: Mr. Carson?

Q. Are you familiar in the course of your studies and experience with the economic problems involved in the leasing or the purchase of commodities [1306] generally? A. I am.

Q. Will you tell the court just how you obtained that familiarity and how your experience affects it? A. In 12 years of working with the officials of the client companies that I have mentioned and a goodly number of others, the problem of lease or buy is a very common problem. The factors that a business man takes into account, whether he be a manufacturer of paper or a manufacturer of shoes, have considerable commonality. The factors are essentially the same and out of 12-years of counseling with business enterprises I would claim familiarity with the factors that they take into account. Moreover, as an executive of the Washington Post Company I was in a position to make such decisions for a business enterprise myself.

Q. Is there anything, in your judgment, peculiar or special about shoe machinery which excludes it from the considerations that you have been dealing with? A. On the basis of having spent something now approximating nine months to a year in assembling [1307] information on which I could found conclusions as to this case and, in the course of that, consulting with officials of United Shoe, in some instances, and in studying the operations of this company, I see no substantial difference in the basic factors that a shoe manufacturer or another business enterpriser would take into account in choosing between the leasing or buying of machinery.

Q. Have you familiarized yourself with the study of Dr. Anthony on the decision as to lease and purchasing of shoe machinery, Exhibit D-34 in this case? A. I have.

Q. Have you examined the writings of Professor Joel Dean on that subject, dated 1955? A. I have.

* * *

[1308] Q. Would you tell the court what in your judgment, on the basis of the experience that you have outlined, are the economic factors which a shoe manufacturer should take into account and ordinarily would take into account in reaching a decision whether to lease or to purchase shoe machinery? A. The shoe manufacturer would ordinarily weigh two alternative sets of costs: If he leases the machinery or if he leases a truck or a building he is confronted with certain current costs and recurring costs. Those are for rentals and they will often be for maintenance—those two particularly.

If, on the other hand, he purchases the machinery, he is confronted with, first, a one-time capital cost and recurring costs for the use of that capital over a period of time perhaps for maintenance, depreciation and taxes as current costs.

Now, normally if he leases the equipment the recurring current costs will be greater than if he buys the equipment. If he buys the equipment, the one-time cost will be relatively greater and the recurring current costs will likely be less, and he weighs those alternatives in making his decision as to [1309] whether he will buy or lease.

Q. I have already asked you whether you have examined the five Leidesdorf computations whose exhibits numbers I have given you and I would like to direct the

next question to these five plaintiff exhibits each of which is prefaced by a covering letter which states, in part, addressed to plaintiff's attorneys:

> "You instructed us to make this computation as a mathematical process only and that it be based on certain data and assumptions submitted by you as set forth on the accompanying appendix."

I am reading a few words from Plaintiff's Exhibit 41. Do you have a copy of that in front of you? A. Yes, sir. I am familiar with that letter and with the computations.

Q. My question is, do the computations of the S. D. Leidesdorf Company with these plaintiff's exhibit numbers in your judgment correctly depict the kind of situation that confronts a business man when in the course of business he has to make a decision whether to lease or to buy? A. In my opinion they do not.

[1310] Q. Will you explain why not? A. They do not because the business man in making a decision to lease or to buy is confronted with a prospective decision: He must look forward for an indefinite number of years and he calculates either precisely and accurately or he calculates intuitively and very generally what the net return will be over that period of years.

Here we have a set of computations which are a retrospective, as contrasted with a prospective look—a retrospective look in which a number of assumptions, assumptions which in my mind are quite incomplete, are established as the basis for the computations. They have the advantage in looking retrospectively that one can fill in some of the factors that the business man can only forecast in his mind

when he risks his capital one way or another. You know more looking back as to the life of the machinery, as to the costs of capital and other factors that will be involved.

This has the further advantage that for the year 1955 you can look back over the 16 years and one can bring these details together and make a judgment for the whole period that the business man [1311] has no opportunity to make in advance.

When you add together the incompleteness of these assumptions and the artificiality of the retrospective look, assuredly they are not reflective of the kind of situation that the business man is confronted with when he makes a choice between leasing and buying.

Q. By the way, you spoke, in passing, of the cost of capital. Did the Leidesdorf computation make any allowance for the cost of capital? A. No, they do not.

Q. Let me draw to your attention the fact that these five Leidesdorf computations which I hold in my hand, Plaintiff's Exhibit 41, each contain a series of calculations which are called, and I am referring to summary page 2 on Exhibit 41, computed net costs of leasing and computed net costs of ownership.

I would like you to tell the court whether in your opinion these Leidesdorf calculations, or any of them, do correctly state the net cost of leasing and the net cost of ownership of the machinery involved as they purported to do. A. In my opinion they do not reflect the net [1312] cost of leasing nor the net cost of ownership and they do not for three reasons:

In the first place, they do not, as I indicated in response to an immediately earlier question—because there is no provision for the cost of capital, a cost which inevitably is

involved in the ownership of machinery or in the leasing of machinery.

They do not for a second reason in that they take no account of the future worth of the dollars that the business man is investing either in the leasing of these machines or in the ownership of such machines. A business man invests his money in order to obtain a return and he expects a stream of income over a period of years or he would not make the investment. There is no allowance in these computations for such a calculation that inevitably enters the business man's mind.

Thirdly, they do not reflect either the cost of leasing or the cost of ownership for the reason that no allowance is made for the taxes that the business enterprise necessarily assumes by either its decision to lease or its decision to buy.

For these three reasons, in my opinion, [1313] they reflect neither the cost of leasing nor the cost of ownership.

Q. Of the machinery referred to in the computations? A. The machinery referred to in these computations, yes.

Q. Before I ask you details, which I would like to do as to each of these points, I would like to pause for a moment to call your attention to the fact that the five Leidesdorf computations put in evidence by the plaintiff vary among themselves as to certain assumptions relating to service costs and machinery lives. Are you familiar with that? A. Yes. There is a statement of the assumptions in the pages following the summary table and those assumptions vary.

Q. Does the variation among the exhibits with reference to either service costs or machinery lives or both affect to any material degree, in your judgment, the answer you have just given as to the correctness of the net costs of leasing and the net costs of ownership in these exhibits?

A. They do not affect that conclusion at all, Mr. Carson, for the simple reason that the assumptions [1314] vary and the variations result in the different end products for these several computations, that is, end products in the sense of a different sum arrived at as the computed net cost of leasing or the computed net cost of ownership, but no variations in these assumptions alter the deficiencies or overcome the deficiencies that I have cited:

The failure to include any recognition of cost of capital, the failure to recognize the business man's concern with the future worth of his dollars and thirdly, the failure to recognize that a business enterprise is taxed.

Q. Would you take these criticisms that you have made, beginning with the first, as to cost of capital, and would you kindly tell his Honor why you say the cost of capital should have been taken into account in the Leidesdorf computations in computing what is called there the net cost of leasing and the net cost of ownership? A. The cost of capital, in my opinion, must be taken into account for the simple reason that it is a cost that a business enterprise incurs in doing business. It is a cost just as much as the cost of the labor the business enterprise uses, the raw [1315] materials that it buys.

As Cal Coolidge once said in relation to the British loan, "They hired the money, didn't they; why shouldn't they pay for it?"

The business enterprise obtains its capital from one of four principal sources and it inevitably pays for that capital in one way or another. The failure to include the cost of capital is to my mind a simple confusion between out-of-pocket payments and true costs or economic costs. I think that confusion will become clearer if I may indicate the four principal sources of capital for a business enterprise and what a business enterprise pays for them.

Q. I was going to ask you to do that. A. The four principal sources are debt, bonded debt or current borrowings; preferred stock; common stock, or retained earnings.

These are the usual sources from which a business enterprise derives its capital. For two of those sources the cost is usually obvious. For debt the interest rate is either fixed in the indenture of the bonds or it is fixed in relationship with the borrowers, the bank or other, and there is usually little question as to whether there is a cost [1316] of such capital.

So it is with preferred stock: the cost there is usually apparent. The cost is customarily fixed in the rate of dividend provided for in the indenture for the preferred stock and this is apparent and obvious cost.

When you come to common stock, the cost is not always as obvious and yet it is nonetheless just as real. The stockholder who purchases common stock customarily does it with the prospect of receiving a stream of income—makes an investment in order to obtain a return and he will usually pay for that investment a price which is determined by the earnings that the company has. This is a very common concept in the purchase of common stocks and that ratio of earnings to price reflects the cost of that capital to the business enterprise that would sell common stock.

The fourth source of capital for business enterprises, and a one that is used with increasing frequency in recent years, is the retained earnings, the earnings that the enterprise itself makes and retains for its use either by not paying dividends or by paying out only a portion as is the customary [1317] case, of the earnings it makes.

The cost of those retained earnings is also less obvious but, nonetheless, real. The stockholder, if you look at it from a stockholder's viewpoint—the stockholder either expects earnings on the earnings that are retained, in the long

run, or he doesn't keep his capital in the enterprise. If the corporation retains those earnings for its own operations, the stockholder loses the opportunity to invest them to an advantage. This is what the economist customarily calls "opportunity cost." This is a customary concept in the evaluation of the costs of retained earnings.

[1318] Q. Do you know of an economic authority which supports the opinion you have just expressed concerning cost of capital? A. Well, there are two points in the opinion I have just expressed. The first one is that the cost of capital is an element that should be recognized in the calculations of a business enterprise.

The second thought that I have expressed in that judgment has to do with the cost of retained earnings.

I would like to answer your question separately with respect to those two.

With respect to the recognition of the cost of capital as a cost to be concerned, I think the most relevant economic authority I can cite are the two economists who were advising the parties to the negotiations in 1954-55 that had to do with the plan for terminating leases then in effect. Those two economists were Dr. Robert Anthony of Harvard University and Dr. Joel Dean of Columbia University.

Dr. Anthony in his Annex 1 to what I think is now Defendant's Exhibit 34—Dr. Anthony there states clearly that he agrees with Dr. Dean that the cost of capital should be recognized in determining [1319] whether a shoe manufacturer would be better advised to buy or to lease and give a considerable statement as to the logic of that position.

Joel Dean in his——

Q. Could I interrupt you a minute? A. Yes.

Q. You said he gives a considerable statement as to the logic of that position. What parts of D-34 do you refer to?

A. I am referring paricularly to Annex 1, and on the very first page of Annex 1 he states it in terms of his "Points of Agreement" with Dr. Dean, and he states:

> ". . . we are in agreement with Dr. Dean regarding:
>
> "The meaning to be attached to the concept of a company's cost of capital. The premise that the cost of capital of a shoe manufacturer can best be estimated by taking the weighted average of the costs of his equity capital, his preferred stock and his debt and the premise that retained earnings should be included as equity capital in these calculations."

And then on page 3, and I am——

[1320] Q. Of the same annex? A. Of the same annex. And I would cite really the whole document as the support of my point, but on page 3 in a very summary statement:

> "We are in agreement with Dr. Dean that it is necessary to have the best possible estimates of what the cost of capital is, and we are in agreement with him on the definition of the concept to be measured in finding the cost of capital of any shoe company."

I cite this simply as evidence or support of my point of view that cost of capital is a factor that inevitably has to be taken into account.

Now, Joel Dean, in his Appendix 3, devotes the whole of that appendix to the analysis of the cost of capital, and while it is difficult to find an explicit statement in which he makes essentially the point in a terse one or two sentences,

it is perfectly apparent from his calculations that he regarded the cost of capital as an essential element in the shoe manufacturer's judgment as to whether to buy or to lease.

Q. Are you referring, when you mention Dr. Dean, to the brochure which I hand you entitled "Determina- [1320] tion of Optional Sale Prices for Outstanding Machines," with a covering letter from Joel Dean dated March 9, 1955? A. I am referring to that document, and let me make sure of it—and to Appendix 3, which is described "Method for Estimating the Average Shoe Factory's Cost of Capital."

Q. You have examined that document and taken it into account in reaching your conclusions in this case, have you? A. I have.

Mr. Carson: I ask to have the Dean brochure just mentioned marked Defendant's Exhibit D-53 for identification.

(Defendant's Exhibit 53 marked for identification.)

Q. On this first point that you mentioned, have you any other specific citations of economic authority? A. I am sure I could find others, because I believe that almost any reputable economist confronted with the same problem would come to the same conclusion, but I have none others that I would cite at the moment. These two, it seems to me, suffice to make the point.

[1322] Q. Are they, in your judgment, in accordance with the weight of economic authority? A. They assuredly are.

Q. Will you refer to the second point that you mentioned previously as to the cost of capital which I think had to do with retained earnings, did it? A. Yes, the second point I made——

Q. Can you give us authorities on that subject? A. The second point I made on that subject was that retained earnings have a cost even as other forms or capital derived from other sources have a cost.

As an authority for that statement, I have several I would cite here. I have a book by Professors Bierman and Smidt entitled "The Capital Budgeting Decision." They are both professors at Cornell University, and on page 142-43 of that——

Q. Would you read into the record what you referred to there? A. "The costs associated with retaining some part of the current earnings are not always obvious. Frequently corporate officials have taken the position that these funds are without cost. If we stipulate the economic interests [1323] of present stockholders as overriding, then these funds are not free, and the cost associated with them must be measured by the opportunities foregone in using them in one way instead of in other possible ways. Essentially there are two kinds of opportunities for the use of corporate earnings. They may be retained within the corporation or they may be distributed as dividends to stockholders."

Now, he goes on to discuss the same point for a couple of pages and then in italics he presents, on page 144—or they, I should say, present their conclusion and that conclusion is:

> "The cost of using retained earnings is therefore the minimum yield that must be earned on additional investments within the company in order that the additional investment will be as valuable to the stockholder as the corresponding immediate increase in dividends."

Now, I think I could cite several other authorities and I will gladly do so. I have brought along a statement by Professor David Durand—or Durant, I think he pronounces it—at MIT, which would essentially state a similar point of view.

[1324] Q. What is the name of his book? A. His statement is included in an article entitled "The Cost of Debt and Equity Funds" and it is published in a book entitled "The Management of Corporate Capital," which is edited by Professor Ezra Solomon of the University of Chicago.

Q. What page? A. The particular citation that seems to me most pertinent to the part we are discussing is on page 112.

Q. Now, without expanding the record by the language of Dr. Durand's opinion—unless your Honor desires it or counsel desires it——

The Court: No.

Q. I will go on to ask you if you can cite further economic authority for this second point? A. Yes, I can cite also a book by Ronnello B. Lewis, who is a partner in E. F. Hutton & Company. The book is entitled "The Financial Analysis for Management," and on page 181 he makes a very brief statement which deals immediately with it.

He says there:

> "While retained earnings may appear to many as the most easily available source of equity [1325] capital, it is quite misleading to say that this source of capital represents a zero cost."

Q. Any further authority?

Mr. Hayes: What is the title of that book?

Q. Would you give us the title of the book? A. I think I did. "Financial Analysis for Management." Published by Prentice-Hall.

Q. Can you mention any further specific authority? A. Yes, I brought along one other. The remaining one that I have brought with me is a book by Professor Donaldson, Gordon Donaldson, associate professor at the Harvard Business School. The book is entitled "Corporate Debt Capacity."

The citation that is immediately on the point is found on page 60, in which he—it is a very brief paragraph, I can include it very readily:

> "Financial theory would argue otherwise. With respect to retained earnings, theoretical calculations would apply an opportunity cost which is a return that would be realized if the money were invested in the best alternative investment opportunity of comparable risk outside the company. Thus the decision to retain [1326] and reinvest depends on an internal investment opportunity which can at least match the opportunity cost."

And this becomes the cutoff point.

Q. All right, now let us direct our attention to the specific case of the Hanover Shoe, Inc. in relation to this economic principle that you have been describing.

Would you tell the Court what, in your opinion, was its cost of capital in 1939 to 1955?

First give us the conclusions, and then I will ask you to give us the sources for your conclusions. A. Well, my conclusion is that the cost of capital for the Hanover Shoe Company over the period 1939 to 1955 ranged from 14 per cent to 22 per cent.

Q. You mean it was not less than 14 per cent at any time in that period? A. In my opinion, if you look at the period as a whole, it was not less than 14 per cent.

Q. Now, would you explain your basis for this conclusion? A. My study of the financial statements of the Hanover Shoe Company indicates that the capital the [1327] company had was derived—was not derived from bonded borrowings; it was not derived except in a relatively small portion, and only at periods of time from current borrowings, it was not derived in any significant part from preferred stock, although there was, I believe, a preferred stock dividend in 1946.

It was derived from two principal sources.

Q. Could I interrupt you just a minute. I would like to be clear as to the financial statements of Hanover that you are referring to. You spoke of study of the financial statements. A. I am speaking of the annual balance sheets and profit and loss statement for the years that I have referred to, 1939 to 1955.

Q. Do you have them here? A. I have them in the briefcase under your table.

Q. They can be produced? A. Yes, they can be produced.

Q. Now, will you go forward——

Mr. Carson: I will explain, your Honor, they were produced on examination before trial.

A. I have said that the capital that Hanover [1328] used throughout this period was derived from two principal sources. Those sources were the sale of common stock to the then stockholders and this stock was, as is clear in the record—Mr. Carson, if I may correct myself, I find I have

those financial statements right here rather than in that briefcase.

Mr. Carson: All right, they can be produced if counsel wishes to see them.

Q. All right. A. The capital that Hanover used throughout this period was derived from the sales of common stock to stockholders or to members of the corporate family because the record shows the stock of this company was throughout this period closely held, and, secondly, it was derived from the retention of earnings in the company.

Now, I have developed a table which indicates the several sales of common stock throughout this period under review. The cash proceeds that were derived from the sale of stock, the price per share—this is the one designated, your Honor, as Table 1 in the very front——

Q. Are you referring to the document that was marked yesterday, Defendant's Exhibit D-47 for identification? [1329] It is the same document? Will you put the same mark on your copy.

Mr. Carson: I think your Honor has it. It is a small page.

Q. This entire document of three pages has been marked D-47—47, not 48.

Now, would you go on to explain how this document was prepared? A. At the bottom the footnote indicates that the source of the data is essentially from Hanover's answer to interrogatory No. 11-A, and in that interrogatory it indicates the number of shares issued and the cash received at each of those—in each of those several years.

I have simply taken that data, developed the price per common share, and I have taken the earnings per common share in column 5, which is developed more fully on the second sheet, and I have determined as a consequence the rate of earnings in each of those years per common share.

Now, that column indicates the rate of return that the stockholders of Hanover, whom it happens were in principal part of the corporate officials of Hanover, charged the corporation for the capital they [1330] supplied. In that sense this is the cost of capital Hanover did incur.

Q. If I may interrupt a moment, to draw your attention to answer 11-A to the defendant's interrogatories, which were supplied by plaintiff under date of April 18, 1956, over the signature of Paul Spears; is that the source you used? A. That is the material that I used.

Q. All right. Have you completed your explanation of Table 1 and the appendix thereto? A. The appendix thereto is essentially a work table which simply is supplied in order to make more clear how I have derived the data in column 5.

Q. Would you look at Table 2 in D-47 for identification and explain how that was prepared? A. This was prepared as the footnotes again indicate from financial statements submitted by the Hanover Shoe Company and compiled by Patterson, Teele & Dennis, accountants in Boston, and it was compared from—it was prepared from the data in paragraph 8 of the stipulation dated March 22, 1957.

And here what I have attempted to do is simply show the stockholders' equity as of the end—or as of the end of the preceding year in each instance, [1331] and then the profit after taxes that the company earned on that equity to determine the rate the stockholders earned on the equity they had invested in the company.

This again, in my opinion, is a reflection of the cost of capital to this company. This was the cost that the company—the stockholders expected in return for the equity they retained—they had in the enterprise.

Q. May I go back to your reference in these answers to paragraphs 7 and 8 of a stipulation of facts in this case. I show you from the appellant's appendix in this case, which contains the stipulation, paragraphs 7 and 8, at pages 31A and 32A, and ask if those are the sources you used in that connection? A. They are the sources that I used, yes.

Mr. Carson: I offer in evidence D-47 for identification.

* * *

[1335] The Court: Exhibit 47 may be admitted.

(Defendant's Exhibit 47 was received in evidence.)

Q. Dr. Corson, you have in front of you a copy of Exhibit 47? A. I do.

Q. Having explained how these sheets were made up, will you tell the court what they indicate with respect to Hanover's cost of capital in the period? A. Table 1, as I have already stated, indicates in my opinion the price the stockholders of Hanover charged the corporation that they controlled for the capital that they supplied over this period of time and that cost ranges from 7.8% in 1940, to 54.5% in 1948.

I don't think either figure taken by itself is a reliable indication of the cost of capital for the whole period. As a consequence, I have calculated the weighted average of the cost of capital over the period as derived in this manner:

The weighted average of the figures in Column 6 is 22.14%. This over the period 1939 to 1955, [1336] is the

rate at which the stockholders, when you take into account the ratio of price of stock to earnings, charged for the capital they supplied.

Table 2, which to my mind is a supplementary evidence as to the cost of capital to Hanover throughout this period, indicates in Column 4 the rate of return that the company had on the stockholders' equity. This is what the stockholders essentially earned on the money they had supplied and supplied either by the purchase of stock or by the retention of earnings and the stockholders and the corporate officials were in principal part the same.

Here is the rate of earning that they had on the capital they supplied. The average of this column approximates 14.1% and it is on these bases that I say the cost of capital to Hanover over this period ranged from not less than 14% to as high as 22%, and I would emphasize that I am talking about the cost of capital that Hanover did in fact incur.

Q. That is, you are basing it on the prices of the stock, as you indicated? A. I am.

Q. Is there any ground, in your opinion, in the facts that you have examined to conclude that the [1337] cost of capital of Hanover in this period 1939 to 1955, might have been greater than the 14 to 22% range which you have described if Hanover had purchased the shoe machinery described in the Leidesdorf exhibits? A. Yes. I think as a matter of logical reasoning the cost of capital that Hanover incurred in fact would have been greater if you assume that Hanover had purchased the machines and thus had assumed the additional, what might be described as machinery risk.

By "machinery risk," I mean if Hanover had invested its capital in the machines and had exposed itself to the

risk of machinery malfunctioning, of the obsolescence of the machinery, of the loss of economic value of the machinery, because some of the shoe products that the machinery made were no longer marketable—if you had these factors together, these machinery risks.

These are risks that the lessor, United Shoe Machinery Corporation, did in fact bear during the period 1939 to 1955. If Hanover had borne those risks, it seems to me the economist would logically assume there would be some additional cost of capital. Dr. Anthony in Plaintiff's Exhibit 34 dealing with the [1338] same point devotes, I think it is Annex 3, to this point and estimates that the assumption of this machinery risk would have added a cost he approximates at 2%. I would prefer not to attempt to estimate what it would be, but I am of the opinion that it would logically have added to the cost of capital over this period of time.

Q. In other words, in your answer you are taking no account of this factor of machinery risk? A. I am taking no quantitative account of it.

Q. By no quantitative account, you mean it does not appear in the figure 14 or the figure 22 that you fixed as the range? A. That is exactly what I mean, Mr. Carson.

Q. I will ask you to assume that in this particular instance of Hanover in the period 1939 to 1955 at all times Hanover had in its current account in the bank free cash adequate to purchase the shoe machines described in the Leidesdorf computations and ask you to tell the court whether that affects your testimony as to the 14 to 22% cost of capital. A. It doesn't. By the 14 and 22%, the approximation of the cost of capital, I am measuring what the cost of capital for Hanover was in fact during [1339] this period. Wherever it was using that capital, if it lay

idle in the bank or were invested in buildings or inventory, this is what the capital cost them.

Q. In your judgment, that cost must be taken into account in determining the cost of ownership of machinery? A. In my judgment, it must be taken into account.

Q. Assume alternatively that during this period Hanover could have borrowed the requisite funds to purchase the machinery shown in the Leidesdorf computations at the interest rate of 2%. Does that affect your previous answer as to cost of capital? A. Well, it is an incongruous assumption, if you will forgive me for saying so, because here is a company that over this period of time had substantial funds available. It is an unreasonable assumption to say that they would have allowed those funds to remain idle in the bank and gone out and borrowed additional capital. If they had, that would have been an additional cost to be taken into account.

You will recall that in the citations that I have already given it is indicated by other [1340] authorities, and it is surely a view I would support, that in calculating the cost of capital of any enterprise one essentially averages out the cost of capital derived from each of several sources. We have here in the estimate that I have given the cost of capital from the sources Hanover did in fact use. If it had in addition, no matter how much idle cash it had on hand, gone out and borrowed additional money this would have been an additional cost of that capital, not a lessened cost of that capital.

Q. In other words, the fact, if it be the fact, there was available a bank loan at 2%, it doesn't affect your answer? A. It would not affect my answer.

Q. But you say an actual borrowing at 2% would have added the 2% to your judgment of the cost of capital? A.

It would not have added 2%; it would have averaged out the total capital at a somewhat additional cost.

* * *

[1341] Q. Now, with reference to the capital of Hanover, is there any expression by Dr. Anthony in Exhibit D-34 relative to the cost of capital that would be helpful to the Court in considering your estimate of Hanover's cost of capital? A. Dr. Anthony in that exhibit, No. 34, Defendant's Exhibit 34, includes as his—and I quote his words —"best estimate"——

* * *

A. (Continuing) There he states in the final sentence of the first paragraph, "Our statistical analysis of the entire body of data that is used by Dr. Dean——"

* * *

Q. You are referring to a document which appears [1342] to be a preliminary document. Let me show you Exhibit D-34. The document which has been marked D-34 called "Revised May 7, 1955." I think you are looking at the unrevised edition. A. I believe I have.

Q. Now, the only D-34 is the revised edition. See if you can find your reference in that. A. The first, the same sentence, in the same place, on the same page of Annex 1, "Our statistical analysis of the entire body of data——"

* * *

A. On page 1 of Annex 1, Dr. Anthony writes:

> "Our statistical analysis of the entire body of data—that used by Dr. Dean supplemented with the additional figures we were able to find—leads to an estimate of 18-plus per cent as our best estimate of the cost of capital involved [1343] in this proceeding."

I think in the copy I was using it is on pages 27 and 28.

Q. Let's transpose that to the revised edition which is the exhibit. Can you find the same passage in D-34? Have you found it? What page of Annex 1 is it? A. On pages 27 and 28, he——

Q. Would you read the portion you have in mind? A. I don't find yet the 18 per cent figure which is stated somewheres on these pages as well. On pages 33 and 34 of Annex 1 in the revised edition of his report entitled "Sales Prices for Outstanding Shoe Machinery," he gives his final estimates of the cost of capital, and there on page A34 he states:

> "On the basis of this analysis, we have used 18 per cent as the cost of capital in all other calculations in this report."

The annex gives the basis for his conclusion that 18 per cent is the appropriate cost.

> Mr. Hayes: If your Honor please, I move to strike the answer because there is nothing here about Hanover in what Dr. Anthony said.

Q. My question was directed to whether or not [1344] anything Dr. Anthony said related to your conclusion about Hanover's cost of capital in your judgment. A. In my judgment, this is relevant to a consideration of Hanover's cost of capital. Dr. Anthony was estimating the cost of capital for a "typical shoe manufacturer."

If you will read this report, it will become clear that the shoe manufacturers for which Dr. Anthony was assembling data were operating in the same industry, at the same time, and ranged about the same size as the Hanover Shoe.

Hence, in my opinion, it is a relevant evidence as to Hanover's cost of capital.

It is clear that the cost of capital for any individual shoe manufacturer will vary. This is only a frame of reference in which one can view the approximations I have offered as to the cost of Hanover's——

Q. That is what Dr. Anthony says is a frame of reference, is that correct? A. That is correct.

Q. Now, what portion of the Annex 1 are you referring to when you say that it is clear that he is referring to the typical shoe company, or what is [1345] there there? Call the Court's attention to what you think makes it applicable to Hanover.

Q. He gives in this report on page A13 of Annex 1—he gives a table indicating, among other things, the size of companies that he was taking into account. This is probably better shown in section 3 of this annex entitled "Estimates of Cost of Capital of Typical Shoe Manfacturer.

Mr. Hayes: What page is that?

The Witness: This is on page A27, starting with section 3 which continues over pages through the balance of Annex through page A34.

Q. Now, have you completed your answer to the question? A. I have.

Q. Will you go on to the second of the three points you make following the cost of capital with respect to the Leidesdorf calculation and describe the concept of future worth in so far as it affects Plaintiff's Exhibit 41 and the other Leidesdorf calculations. A. I stated three reasons as to why I do not believe that the Leidesdorf computations reflect the cost of Leasing or the cost of ownership.

[1346] The second of those was that the Leidesdorf computations do not take into account the future worth of the dollars employed by Hanover in either alternative, either the cost of leasing or the cost of ownership. A shoe manufacturer as well as any other business enterpriser makes an investment either to lease, making it in terms of rentals or to buy, making it in terms of purchase cost, in order to obtain a return, in order to earn profits, and, as I said earlier, either unconsciously or precisely or intuitively and generally he calculates not just what the cost of the immediate expenditure is but what return he will—he may reasonably expect to derive from that investment.

He looks forward over the probable lifetime of the asset he would buy and he attempts to calculate what return he can derive from that investment, and he makes his choices as to investments, as to buy or as to leasing, in terms of such a prospective look as to what the return on his use of the capital he has will be.

Now, to make it very simple, it seems to me if the businessman with cash available were to put it in a bank, he would earn—in a savings bank—he [1347] would earn interest, and if he were to leave it there over a period of sixteen years, he would earn interest on that interest, and at the conclusion of that sixteen years the dollars that he had invested in that way would have a future worth substantially greater than their worth at the time he made the investment.

Now, obviously, if by the simple exercise of depositing the funds in a savings bank he will derive a future worth out of those funds, in calculating whether he will make an investment in machinery, he must calculate that at least he

will do as well or better, particularly if the capital costs money to get it in the first place.

Another illustration of the same point: If he were to borrow on the funds, if he were to borrow on them from a bank and if he were to keep them for sixteen years, what would he pay the bank at the conclusion of that period? Well, obviously the bank, if he had not paid either principal or interest throughout the period, would expect him to pay the original—to repay the original principal with interest compounded throughout the period. This is the future worth of the dollars that he was then given [1348] —he was then loaned by the bank.

Now, it seemed to me that either in the calculation of the costs of leasing or in the calculation of the costs of ownership, one must take into account the future worth of the dollars employed in either alternative.

Q. Is future worth an established economic concept? A. I think this is an accepted and established concept.

Q. How is future worth computed in this kind of situation of the purchase of a commodity or machinery? A. It is really a very simple exercise of compounding at the relevant cost of the capital employed the dollars that one invests in one way or another.

Q. Now, would you go to the third element in your previous answer about the correctness of the Leidesdorf computations, that is to say, taxes, and explain to the Court what the impact of taxes would be on purchase or on leasing of shoe machinery in the period 1939 to 1955? A. The third reason why I think the computations are useless in arriving at a judgment as to the relative [1349] cost of leasing or of ownership is that they take no account of the taxes that a business enterprise pays, and the adjustment of those taxes, if it were to buy rather than to lease.

If the business enterprise leases equipment, it pays rentals. Those rentals represent a deduction from current income taxes, both Federal and state.

During the period we are concerned with in this proceeding there were also excess profits taxes involved for a portion of the time. If the shoe manufacturer in the alternative proposes to buy rather than lease, he has a lesser current expenditure that is deductible from the income that is exposed to income taxes, and hence there is a variance that must be taken into account in comparing one with the other.

Essentially, and I assure you the business enterprises that I counter with, take into account the taxes that are involved in the decisions they make. It is certainly good business practice these days to let Uncle Sam pay a portion of the cost of your operations if that is possible to do, and where you lease, you subjected less income to taxation, and where you bought you subjected more income to taxation.

One final point I would make with respect [1350] to taxes, here in the computations that Leidesdorf has presented, you have also the assumption that machines were bought and were subsequently disposed of, and there is a deduction of disposal values.

Now, wherever the machine would have been disposed of in a period of less than the total depreciation period, and if there were a yalue remaining on the books—let me put it this way: If the disposal brought back into the company a value greater than the depreciated value of the machinery on the books, then there was in fact a capital gains, or a capital gain which was subjected to taxation and for which now allowance has been made in these computations.

These factors: Federal income taxes, corporate income tax, the state corporate income tax, the excess profits tax in

the years that was applicable, and the capital gains taxes, all, it seems to me, have to be taken into account if one would approximate the cost of leasing and the rental cost of ownership.

Q. And you find no references to taxes whatever in these Leidesdorf computations? A. I find no reference to taxes whatsoever.

Q. Now, going back over your testimony as to [1351] cost of capital, future worth and taxes, let me just ask you to be sure that I am clear:

Is there any reference or account taken of future worth in the Leidesdorf computations? A. There is no account taken of the future worth of the dollars employed in these computations.

Q. In view of the fact that these three elements, cost of capital, future worth and taxes you say are left out of the Leidesdorf computations, would you tell the Court what, in your opinion as an economist, is their value as a true comparison of net cost of leasing with net cost of ownership? A. In my opinion as an economist, these computations shed no light. They are in fact useless in reflecting the cost of leasing and the cost of ownership, relative cost of ownership and leasing to Hanover over this period of time.

Q. Now, I would like to ask you to apply for us the three concepts that you have outlined here to one of Leidesdorf exhibits and take, for example, Plaintin's 41 dealing with the machine types 1 through 20, covering letter of March 10, 1961, from S. D. Leidesdorf & Co., containing the 13.3 per cent [1352] service costs, and the historical data for machinery lives.

I think you have already said that the variations in service costs in machinery lives don't affect the outcome

substantially, is that right? A. They do not affect my judgment as to the reliability of these estimations of the cost of leasing or cost of ownership.

Q. Would you take this one, Exhibit 41, as a sample, and apply for us the three factors that you have testified should have been taken into account by S. D. Leidesdorf & Co. or by the plaintiff in submitting these exhibits? A. I will gladly do so. Let me start by referring to Plaintiff's Exhibit 41.

The first column showing dollar values to the right, headed "Computed Net Costs of Leasing."

Q. You are referring to summary page 1? A. Excuse me, I should have added I am referring to the summary that follows the letter in Plaintiff's Exhibit 41, and I am referring more specifically to the first column to the right of the dollar values. It is headed "Computed Net Costs of Leasing," and the total of that column is $1,863,679.66.

[1353] Now, in making clear what would be the effect if one takes into account the three elements that I have identified: The cost of capital, the future worth of the dollars employed and taxes with respect to the economic cost of leasing, I have developed what is now Plaintiff's Exhibit——

Q. There has been marked as Defendant's D-48 for identification a document called "Table 3." Is that what you are referring to? A. That is what I am referring to.

* * *

Q. Now, will you describe what this tabulation represents? A. Well, the title of the tabulation indicates I think, clearly what it represents. It represents the economic cost of leasing with the effect of the three elements of economic cost that I have identified, taken into account and added to Leidesdorf's computation of the net costs of leasing.

I have added these three factors into the consideration by simply taking Plaintiff's Exhibit 41, [1354] and this attempts to show what the economic costs of leasing would be if one takes into account the cost of capital, the future worth of the dollars.

Now, if I may describe this table to you, I think I can make clear how it does so.

The first horizontal line of figures which is under the heading "Leasing Costs are overstated to the extent that capital would have been recovered through tax savings when rentals were deducted from income as an expense."

Now, line designated A, the first horizontal line of figures, is taken from the Leidesdorf computation which is Plaintiff's Exhibit 41. If you will notice the figure in the column to the far right, $1,863,680, that is the identical figure that is found in the Leidesdorf computation in which I have only rounded off to even dollars.

Now, that horizontal line of figures simply represents by years rather than as Leidesdorf by individual machine the costs of what Leidesdorf describes as the computed net cost of leasing.

So I start with the Leidesdorf figure. Then in the second horizonal line, the relevant rate at which income was taxed, I have stated a derived rate [1355] of taxes which brings together the Federal income tax, the excess profits tax in the years in which it was applicable, the state corporate income tax, on the proportion of Hanover's income that was subject to corporate income tax in Pennsylvania, I have brought these factors together in that figure stated on this second horizontal line, year by year.

The third horizontal line is entitled "Capital Recovered Through Tax Savings."

Now, when Hanover paid in the year 1939 $25,520 as a rental, it subjected that much less corporate income to taxation, and to that extent it saved—this is a common concept in business usage—a tax savings as a result of that expenditure, so that the net capital employed in leasing, the net cost to Hanover of leasing that year—I am suggesting by this table—was $19,344 in the year 1939 rather than the $25,520 stated in the Leidesdorf computations.

Now, proceeding to the fifth horizontal line of figures, that designated as 2A, the future worth of net capital employed, that is its value on September 21, 1955, is calculated by multiplying the net capital employed in leasing, item 1D, that is the figure just above the $19,344, by a factor which compounds the [1356] annual figure at 14 per cent. That is, at the rate of the minimum rate of Hanover's cost of capital.

So the future worth of the net capital employed in leasing is arrived at by multiplying the $19,000 by the factor that I have just indicated to arrive at the total value of that leasing or the total leasing cost over a 16-year period of $179,445.

Now, the longer the capital is tied up, the more the cost over a 16-year period is inevitably going to be, so that I have calculated that for the 16-year period—and here I am especially concerned with getting a comparable figure, comparable with a prospective cost of ownership—I have estimated that the cost of leasing, the economic cost of leasing, approximated $2,247,753 for the total 16-year period, and that is to be compared with the figure presented in the Leisdesdorf computation of $1,863,679.

[1357] Q. This document, as you have said, is confined to the economic cost of leasing only, isn't that right? A. That is correct.

Q. And the total to which you have testified is predicated, as I understand, on the tax rate which you have stated in this document year by year through the period 1939 to 1955? A. That is a factor that is taken into account here.

Q. And this tax rate, as shown by the document, varies a good deal, doesn't it? A. Yes. Taxes over that period of years did vary.

Q. I am going to ask you to describe the manner in which you come to the tax rate and I call your attention to D-49 for identification. Was this prepared by you or under your supervision? A. This was prepared under my supervision.

Q. Will you describe what it is. A. This table is an attempt to derive a marginal income tax rate that would permit one to approximate the tax savings involved in either leasing [1358] or ownership.

Q. Could I stop you just a minute?

What is the significance of the word "marginal"? What do you mean by "marginal tax rate"? A. The significance of the word "marginal" is that if Hanover had had additional income exposed to taxation its rate in several years would have been greater than it did in fact pay. It was the tax rate that would have been applicable to the next increment of the income under existing tax statutes.

Q. Would you go on and explain what D-49 for identification is? A. If I may, I ask that you look first at page 2 of the two tables that make up this exhibit. In that table, in the first column, headed "Federal Normal Income Tax Rate," I have attempted to state the applicable normal income tax rate prevailing in that year, and then I have attempted to state in the second column the excess-profits tax rate applicable to Hanover and then there are com-

ments which were prepared under my supervision and which I hope make clearer why there was no excess-profit statute, for example, in 1939 and what was the rate [1359] used in other years.

The last column to the right essentially brings together these two figures in a composite figure, which I describe as the effective federal tax rate. That figure, then, is carried over to the first sheet and you will find that the last column to the right on page 2 is identical with the first column to the left on the first page of the table.

Q. Which is also entitled "Effective Federal Tax Rate"? A. Which is also entitled "Effective Federal Tax Rate."

Then in the columns to the right I have endeavored to do three things:

First I have endeavored to interrelate the federal and Pennsylvania State taxes, first for those years in which the federal income tax was allowed as a deduction, the years 1939 to 1942, and then, secondly, I have attempted to determine the proportion of Hanover's income that was taxable by the State of Pennsylvania—that is, to allocate that portion of the income that was subject to taxation in the state—and, thirdly, I have attempted to bring together the effective Pennsylvania [1360] tax rate and the federal income tax rate to arrive at the tax rate that I have used in these tables.

Q. That is the last column on Exhibit D-49 for identification? A. That is correct.

Q. So that you state that the figures appearing in the righthand column, on the first page of D-49 for identification, are the same figures that you have applied year by year in Exhibit D-48 for identification against the Leidesdorf net costs of leasing in each year? A. That is correct.

Q. In order to get what you have previously described as the capital recovered through tax savings and the net costs of leasing in each year? A. That is correct.

Q. As shown by D-48 for identification? A. Correct.

Q. Could I ask you to explain how you worked out the future-worth figure that you have used in the item called 2-A of D-48 for identification? A. I said only a few moments ago that the calculation of future worth is really the simple exercise of compounding the value of the dollars [1361] employed to the relative cost of capital. The table that I prepared that is now designated as Exhibit D——

Q. I think there was a table marked yesterday in your absence which is called table 5 and it has been marked D-50 for identification. Is that the one you are referring to? A. This is the one I am referring to. All this table does is simply to indicate how I have derived the future-worth factors that I have used in D-48, and are presented in line 2-A in D-48. I have simply taken here fourteen per cent, which was the lowest point on the range I suggested as the cost of capital to Hanover, and I have shown here how that grows as compounded from year to year over sixteen years.

One could do this just as readily by taking a book of compound interest tables and taking the figure from there. I thought it might add some clarity by including this.

Q. The figure that you obtained over the period is what figure, using the rate of fourteen per cent? A. Well, if the capital was employed throughout [1362] the sixteen years, that capital would be compounded at a rate of 9.276 plus. This capital, however, was not static throughout these sixteen years. They was more or less employed either as rental payments or leases or would have been employed as purchase prices for machinery, so that the amount of

capital employed throughout the period varies from year to year and that has been taken into account.

Q. You mentioned purchase price of machinery. I want to be very clear that so far we are discussing in Exhibit D-48 for identification only economic cost of leasing. A. That is correct.

Q. That is not the purchase price? A. That is not.

Q. The figure you derived on Exhibit D-50 for identification was applied on D-48, was it? A. It was.

Q. And where and how? A. It was employed in line 2-A, the fifth horizontal line of figures.

Q. By applying that figure of 9.2765 for the year 1939 on the net capital employed in leasing, you arrive at the future-worth figure of $179,445, [1363] do you? A. That is correct.

Mr. Hayes: I am sorry to interrupt but did I understand that you said that the 9.2765 comes from Defendant's Exhibit 50?

Mr. Carson: Yes.

Mr. Hayes: Would you point it out to me, please?

The Witness: If you will look in the last column to the right of Defendant's Exhibit 50, in the final column, at the bottom, you will see 9.27646417. That has been rounded off to 9.2765 in its usage in Defendant's Exhibit 48.

Q. On Exhibit D-50, for the preceding year, you have a figure of 8.137 and so on. A. That is correct.

Q. As a result of applying the fourteen per cent for future-worth purposes over a period that is one year shorter? A. Right.

Q. Is that the same figure that you have utilized on Exhibit D-48 for identification in the year 1940? A. It is the same figure, rounded off to the [1364] fourth decimal point.

Q. For the purpose of obtaining the future worth as of 1940 of the net capital which was actually employed in leasing, as you computed on D-48, is that right? A. That is correct.

Mr. Carson: I offer in evidence Exhibits D-48, 49 and 50 for identification.

The Court: Any objection, Mr. Hayes?

Mr. Hayes: If your Honor please, I have several objections to——

Which were the ones you offered?

Mr. Carson: 48, 49 and 50.

Mr. Hayes: I have several objections to these. Take Exhibit 48, for example. Taxes are shown here as an adjustment. It is well established that taxes haven't a thing to do with it because plaintiff, if it recovers here, has to pay taxes on the recovery, to begin with. That is without elaborating, your Honor.

The Court: Do you want to postpone until the cross-examination is finished? Do you have to have it in evidence now, Mr. Carson?

Mr. Carson: I can wait, your Honor. I [1365] think it is a little easier if we have the document in evidence while the witness testifies, but there has been no objection as yet to testifying from an exhibit for identification.

Your Honor appreciates that we are trying to measure the true and fair comparison between the cost of ownership and the cost of leasing and we

submit it is obvious that to get a true and fair comparison you must take current annual taxes into account.

The Court: If you establish, Mr. Hayes, that factors have been considered which should not have been considered, I don't think that keeps these out of evidence.

Mr. Hayes: I have a further objection, your Honor, and that is that these tabulations—and this really goes to cross-examination, in a sense—that these tabulations go far beyond, to put it this way, what Mr. Carson, when he objected to the Leidesdorf reports—if I recall the word, he said "fantasmagoria."

Here we find, on Defendant's Exhibit 48, as I understand it, that the Leidesdorf computed net costs of leasing was $25,000, and I assume he [1366] has that accurately prepared, the copy, and winds up with a future worth of net capital employed in leasing of $179,000.

The Court: That is right.

Mr. Hayes: Maybe we should amend our complaint to plead on the basis of $179,000, which was our cost——

The Court: When you get the cost of purchasing machinery——

Mr. Hayes: I am sure it will be offset, yes. They come out with a counterclaim against us, your Honor.

The Court: I am going to admit these and if I am wrong it can be corrected later. I think your cross-examination and arguments may present them in a different picture, but I certainly think that the

proper foundation has been laid and I think that they are relevant and at this time I will admit those exhibits, 48, 49 and 50.

Mr. Carson: We shall ask your Honor to weigh them against the future exhibits which have been marked for identification and the cost of ownership.

The Court: That is right.

[1367] (Defendant's Exhibits 48, 49 and 50 received in evidence.)

Q. I interrupted you somewhat, Dr. Corson. I am not sure whether there was anything further that you intended to say or that you wished to say concerning the construction or the import of Defendant's Exhibits 48, 49 and 50 at this time. A. No, there is nothing I wish to add with respect to those three exhibits.

Q. Then to sum up the effect of Defendant's Exhibit 48, as you have stated, do I correctly understand that as against a leasing cost that S. D. Leidesdorf, Exhibit 41, computed for the machinery involved at a total of $1,063,680 for 1939 to 1955, you, on the basis you have stated, would substitute as a true leasing cost $2,247,753? A. I would.

[1368] Q. Now I would like you to pass on to the other item dealt with by the Leidesdorf tabulations, the net cost of ownership taking Plaintiff's Exhibit 41 as a sample.

* * *

Q. Will you tell the court in your judgment and opinion the three factors of capital cost, future worth and taxes would affect the figures presented by Leidesdorf in that exhibit? A. Again, if I may start by referring to Plaintiff's Exhibit 41 and to the summary table that follows the letter, and to the second column of figures to the right, that column is headed "Cost of New Machinery Acquired" and the total

of that column is $1,681,585.84. This is stated as—to repeat the title "Cost of New Machinery Acquired."

Q. May I see the document from which you take that figure?

(Witness hands document to counsel.)

Q. All right, would you go on? A. Now, I have developed a table to incorporate into the calculation of the cost of ownership the three [1369] factors that I have previously identified and discussed and that table is presented as Defendant's Exhibit—what, Mr. Carson?

The Court: 51, isn't it?

Mr. Carson: I have to find it. I think Table 6 was marked Defendant's Exhibit 51 for identification.

Q. Is that the one? A. That is correct, that is the one I refer to.

Now, starting again with Plaintiff's Exhibit 41, if you will look at the first horizontal line of figures in D-51, you will find that I have reproduced Leidesdorf's cost of new machinery acquired, and I have in the far right column of that first horizontal line that same total, $1,681,586. Again I have rounded it off.

I have simply presented in that line of figures the same data presented by Leidesdorf. I have presented it by years, Leidesdorf has presented it by machine.

Now, the purpose of my including that there is to demonstrate that the ownership calculations in Plaintiff's Exhibit 41 do not state the full [1370] economic costs of ownership; they do not reflect the effect of income taxes, capital gains taxes and the cost of capital employed. I attempt in this table to demonstrate that conclusion, or to support that

conclusion, in three different ways: First, the table adjusts the value of new machinery acquired as it is stated by Leidesdorf to take into account two factors: One, depreciation, and two, the tax implications of the payments or of the depreciation expense.

And the section one of that table of D-51 simply takes the Leidersdorf figure as to the cost of new machinery acquired in each year, indicates the depreciation that would have been taken into account in that year, again applies the relevant tax rate to get at the tax savings resulting from that depreciation, and arrives at a net cost of the new machinery acquired.

Then, the second section of this Defendant's Exhibit 51 attempts to take into account the disposal of machinery throughout that period. I again have taken the figures that are presented by Leidesdorf in Plaintiff's Exhibit 41 as my starting point, and there in Line 2-A, I state the disposal recoveries as determined by the Consumer Price Index [1371] derived from Plaintiff's Exhibit 41. I have here presented them year by year in total from the Leidesdorf computations.

In Line 2-B, I have endeavored to present those recoveries, these disposal recoveries that were subject to capital gains, that is, those machines that were disposed of at a value, and the value again is the value that Leidesdorf has set in the computations, that was in excess of what the depreciated value would have been. It seems to me the business man inevitably would recognize that this is subject to taxation, and here I have in Line 2-C of Defendant's Exhibit 51 stated the relevant capital gains tax rate.

Then in Line 2-D, multiplying the capital gains tax rate by the item listed in Line 2-B, I have arrived at the actual capital gains taxes that would have been paid. It is not a

major item in any year, but it is a relevant item that I would argue must be taken into account, and finally in Line 2-E, I have indicated the after-tax disposal recoveries.

In summary, in that section 2 of Defendant's Exhibit 51, all I have done is to adjust the Leidesdorf figures as to recoveries for the machines that were disposed of by the capital gains that—capital gains [1372] taxes that would have been applicable to them.

Then in the third section of this exhibit, Defendant's Exhibit 51, I have determined the 1955 worth of the net capital employed in ownership, that is, the cost of new machinery acquired less the sums recovered by the disposal of used machinery, and you will notice that Line 3-A is simply a reproduction of Line 1-E. I simply have brought down here the cost of new machinery acquired after one takes into account depreciation and the taxation implications, or tax implications of that depreciation expense, and in the next line, Line 3-A-2, disposal recoveries, I have similarly brought down the item arrived at in 2-E, and then I have subtracted one from the other.

In the last two lines of Defendant's Exhibit 51, I have, as I did in the calculation of the economic cost of leasing, derived the future worth of the dollars that were employed in each year, and you will notice that in some years—in that line I refer specifically to Line 3-B-2—in some years there was a negative figure. The amount of capital that Hanover had employed was reduced in those years, and as a consequence, I have reduced the further worth calculation for those years.

[1373] In total, this Defendant's Exhibit 51 demonstrates that the economic cost of ownership to Hanover for the machines that are dealt with in Plaintiff's Exhibit 41 would have been $3,197,000, rather than $1,681,000, as shown in Plaintiff's Exhibit 41.

Q. Do I correctly understand that in computing the economic cost of ownership you have applied to the Leidesdorf figures the same three concepts of cost of capital, future worth and tax impact that you applied in considering the economic cost of leasing? A. I have.

Q. And have you applied them on the same principles? A. Oh, exactly the same.

Q. Have you attempted in these exhibits to make any other changes or corrections in the Leidesdorf calculations except to take account of cost of capital taxes and future worth? A. No other changes than to add these three elements in arriving at the cost of leasing and the cost of ownership in comparable terms.

Q. Now I would like to ask you some details about the manner in which you have dealt with depreciation, taxes, so-called disposals and future worth on D-51 for identification, but I think, your Honor, perhaps we better take our recess before we get into that. [1374]

* * *

[1375] Q. Dr. Corson, may we go back to D-51 for identification for the purpose of clearing up certain details for me. I take it that as shown on this exhibit, you have applied these three factors of capital worth, taxes and future capital costs—future worth and taxes—to show the extent to which costs of ownership of the machinery involved in Plaintiff's Exhibit 41 are overstated by Leidesdorf and also the extent to which they are understated in order to arrive at the result you give on this Exhibit D-51? A. That is correct.

Q. In other words, you felt that to make a fair assessment of the ownership costs on the basis used by Leidesdorf, these corrections would be necessary? A. That is,

to take into account all of the factors, it should be taken into account in arriving at a cost of ownership. These adjustments are [1376] essential to the Leidesdorf computations.

Q. But I understand from your prior testimony, and correct me if I am wrong, that apart from future worth, cost of capital and tax impact, you have not changed any of the elements in the Leidesdorf computation, is that correct? A. That is correct.

Q. Do you express any opinion as to whether the economic cost of ownership given by Leidesdorf with those three corrections is a true economic cost or not? A. I think this is as nearly a true economic cost as one can arrive at in looking back over a 17-year period of time.

Q. You have, according to this document, used the assumptions—do you have the exhibit in front of you? A. I do.

Q. You have used the assumptions at the bottom of the page that Leidesdorf used? A. That is correct. They are taken——

Q. As stated there? A. As stated in Plaintiff's Exhibit 41, in the pages that succeed the summary table and are headed [1377] "Assumptions and data used in the computation," et cetera.

Q. As they are stated, among the assumptions, you have taken the consumer price index, have you? A. That I have.

Q. I will ask you about that later. In the meantime, I want to draw your attention to the item that you have called on the exhibit 1-B, "Depreciation." Would you tell the Court how you calculated that? A. I calculated it the simplest possible way, and I think this is a reliable way for machinery of this type:

I assume it would have been depreciated on a straight line basis over a 10-year period. That is, you would depreciate one-tenth of the value in each successive year. You

will notice the figure included on that horizontal line under the year 1940 is one-tenth of the value stated in the line above, in 1939.

The figure in 1939 is for half a year, since it is assumed that these machines were acquired as of July 1, 1939.

Q. That is a Leidesdorf assumption? [1378] A. That is a Leidesdorf assumption.

Q. You yourself express no opinion as to when they would have been acquired? A. I have no opinion on this. I simply started with the Leidesdorf computations and added these three elements.

Q. What was the purpose of your taking depreciation into account in this calculation? A. If a business owns the machinery, they do encounter depreciation as a cost. The machinery does wear out through usage and it seems to me it is impossible to make a calculation as to what the cost of ownership would be without taking into account depreciation. That is my reasoning.

Q. Is that related to the tax impact? A. It is related to the tax impact in that if depreciation is taken into account then you have a deduction from the income that is exposed to taxes and that deduction represents essentially a tax saving against that machinery cost.

Q. Did you think it was necessary to take that into account in order to make a fair assessment of the cost of ownership, among other things? A. I did and I so took it into account here in [1379] line 1-D and in the deduction of 1-D that is shown in line 1-E.

Q. You have previously testified about a marginal tax rate for Hanover in the period which you have derived through a previously marked exhibit, have you not? A. I have.

Q. Are the tax rates for the respective years, on D-51 for identification, those same tax rates? A. They are the same tax rates.

Q. In item 2, or paragraph 2, of D-51, where you enumerate the elements where ownership costs are understated by Leidesdorf, according to this document, you mention in subdivision (b) disposal recoveries. What disposals were you referring to—subdivision (a) also. A. By the term "disposals," and here again I am using a term that Leidesdorf has used in Plaintiff's Exhibit 41, in the third column to the right—Leidesdorf shows the reduction of costs of ownership by disposals of used machinery.

Essentially it has assumed by this computation that machines that were turned back would be turned back at the value set in the discount table [1380] you referred to earlier this morning and that that value would be deducted from the original hypothetical purchase price in order to get at the net cost, or the computed net costs of ownership, as they are designated in Plaintiff's Exhibit 41.

I have started, and the disposals I refer to here—to be more specifically responsive to your question, that figure is taken, as I stated this morning, from Plaintiff's Exhibit 41.

The total of $2,260,801 shown at the bottom of the third column of figures to the right in the summary total of Plaintiff's Exhibit 41 is the same figure as I show on line 2-A in this exhibit, D-51.

Q. Do you have any independent knowlege or opinion apart from the Leidesdorf tabulation as to what these disposals are? A. These disposals are, in fact, a mathematical computation of the number of machines on hand at the end of the year. They are not, in fact, disposals in the sense that a machine was turned in at a particular time, but this is one of the foundations of Leidesdorf's computation and

I have followed precisely the same method that Leidesdorf has in order to show the effect if these three additional elements [1381] are taken into account.

This is, in my mind, part of the artificiality of the very computations that have been submitted in this proceeding.

Q. In the same subdivision 2 you have reflected in the years 1949 and following capital gains taxes. Why do you do that? A. I have reflected those capital gains taxes to reflect what it seems to me must be recognized as the inevitable consequence of ownership of machines. If those machines are disposed of at a price greater than the depreciated value on the books, there is a value that would be subject to capital gains taxation and this is simply an effort to demonstrate what that amount would be.

Q. And you found no such item of capital gains tax reflected in the Leidesdorf tabulations? A. I did not.

Q. In paragraph 3 of D-51 for identification, you have a calculation of future worth of net capital employed. Would you explain that? A. Here I have done two things, and only two: I have taken the ownership costs adjusted for income taxes from line 1-E and I have reproduced that at [1382] the lower half of this table and I have subtracted from that line, 3-B-2, the disposal recoveries, which is taken from line 2-E, which is the value of the machines, the used machines disposed of after ad, stment for capital gains.

I have subtracted the value of the machines disposed of from the value of the machines required to get at the net capital employed in ownership, how much capital would have been employed in the ownership of these machines at each year throughout this period of time, and, hence, how much capital did Hanover have employed throughout this other period of time in the ownership of these machines if it had in fact purchased them, and that is shown on the last

line, line 3-B-2, of Defendant's Exhibit 51, in which the end result over the 16-year period is $3,197,000.

Q. Looking at the application of the future worth factors, in the first year, 1939, I see that you start at the top of the column, 1939, with the cost of new machinery acquired, 1-A, which is $356,490. A. Yes.

Q. You get that from Leidesdorf Exhibit 41? A. Yes.

[1383] Q. By the processes reflected in the year 1939, according to the text of this document, you come down to a net capital employed in ownership for that year of $352,176. A. I would correct your statement only to say that is the future worth of the capital that was tied up for sixteen years. That is the worth of that capital in 1955.

Q. What is the worth of that capital—will you use figures to explain that? A. The actual capital expended or invested in that particular year is shown in line 3-a-3, $352,176. Those were put into this business then——

Q. On the Leidesdorf assumption? A. Yes. They were put into this business and they were retained in this business for a period of years.

A businessman who wants to make money, and presumably businessmen do, doesn't put his money in without expecting a return on it and a return that is equivalent to what he should get elsewhere. If he could get as much in a savings bank by letting it sit there and accumulate interest, with interest on that interest, I don't see any reason why he would put it [1383a] into shoe machinery for a lesser return.

All I have assumed here is that that money, $352,176, which was—would have been invested in shoe machinery, had Hanover purchased machinery in that year, would, over those sixteen years, in the year 1955 either have been

worth $3,266,961 or Hanover wasn't getting the return on its investment that it was paying for its capital.

[1384] Q. The purpose of my question was to ask you to explain to us what you did to the $352,176 on Line 3-A-3 in order to get the figure of $3 million-odd. A. Simply multiplied it by the compound interest factor of 9.2765, which as was pointed out this morning, is the compounded interest at 14% for 16 years.

Q. That figure comes from an exhibit D-50, does it, that you have explained this morning? A. It does.

Q. And the next year, 1940, you have the figure of 8.1372 for the same factor? A. That is correct.

Q. Which comes from the same exhibit and so on? A. That is correct.

Q. Now would you explain to us how you get a negative figure for the cost of new machinery acquired in the year 1940? A. In that year the—as a result of the deduction of depreciation the actual capital that Hanover would have employed by the end of the year would have been reduced by the sum of $10,303, and hence since the actual capital employed is reduced by that calculation, I have similarly applied the [1385] compound interest factor and effectively reduced the sum that had been invested in the earlier year by the amount that had been regained through depreciation on the machinery in the year 1940.

Q. So for the year 1940 you are reflecting a saving; is that correct? A. That is correct.

Q. And so on through the following years according to the footing of the columns of each year, you have either a charge for ownership or saving for ownership through to the end; is that correct? A. That is correct.

Q. Ending in the over-all figure of $3,197,473? A. That is correct.

Q. Which you would say on the Leidesdorf computations would be the cost of ownership of this shoe machinery if they are corrected by the three factors that you mentioned? A. That is correct.

Mr. Carson: I offer in evidence D-51 for identification.

The Court: Any objection?

Mr. Hayes: Same objection, your Honor.

The Court: Overruled.

[1386] (Defendant's Exhibit 51 was received in evidence.)

Q. Now using these two exhibits which show the economic cost of leasing, D-48, and the economic cost of ownership, would you explain to the court what in your opinion would be an accurate comparison of the net cost of leasing and the net cost of ownership as Leidesdorf has computed it in Exhibit 41, if you give effect to the three corrective factors you have testified about? A. If you give effect to these three factors, the end products of each of these two tables, that is, Defendant's Exhibit 48 and Defendant's Exhibit 51, taken together, provided a comparison of the economic cost of leasing and of the economic costs of ownership. I have brought these two sets of figures together in what is identified as Defendant's Exhibit——

Q. 52 for identification, marked yesterday? Is this your table, Table 7? A. That is correct.

Q. And that's the one headed comparison of Hanover's economic costs of leasing with its economic cost of ownership? A. That is correct.

[1387] Q. Now, would you explain just how this is made and what it shows? A. In this exhibit, Defendant's

Exhibit 52, I have in the upper part of the table simply reproduced the data from the Leidesdorf computations in Plaintiff's Exhibit 41. On the first line I have reproduced the computed net costs of leasing. The only difference from the figures I presented here and those presented in Plaintiff's Exhibit 41, on the summary table in the first column of figures to the right headed "Computed Net Costs of Leasing" is that I present the data by years; Leidesdorf has presented it by machine type.

Similarly, in the second line of this table, that is, Defendant's Exhibit 52, I have duplicated here Leidesdorf's figures under the heading "Computed Net Costs of Ownership" from the same Plaintiff's Exhibit 41.

Again, my only differentiation is that I presented by years; Leidesdorf presented them by machine type.

Then, in the third line in Defendant's Exhibit 52, I have subtracted one from the other, as essentially Leidesdorf does in Plaintiff's Exhibit No. 41, to get at what's in Plaintiff's Exhibit 41 described [1388] as the excess of computed net costs of leasing over computed net costs of ownership. That is shown in Plaintiff's Exhibit 41 in the last—in the summary table—in the last column to the right, the total shown in Plaintiff's Exhibit 41 in that column as $1,408,894.

In the third line of Defendant's Exhibit 52, you will notice that in the far column to the right I have the same total simply rounded off to the even dollars.

Now, this is, this upper half of Defendant's Exhibit 52, is simply a duplication of the Leidesdorf computation of net costs of leasing, net costs of ownership and the difference between them. In the other half of this table, I have presented what is in my opinion a more accurate comparison

of the economic costs of leasing with the economic costs of ownership.

I have shown in Line 4 the economic costs of leasing which are taken from the last line, Item 2-B, in Defendant's Exhibit 48, and I have shown that by years. Then I have shown in Line 5 the economic costs of ownership taken from Defendant's Exhibit 51 in Item 3-B-2, and in Line 6 of Defendant's Exhibit 52, I again have simply subtracted one from the other, [1389] and at the far right-hand column, I have indicated that the excess of costs of ownership over costs of leasing are approximately $950,000.

That is to be compared to the excess of costs of leasing over costs of ownership as shown by Leidesdorf in Line 3 of this same exhibit, Defendant's Exhibit 52, as $1,408,000, and that is an excess cost of leasing as distinguished from an excess cost of ownerhip as shown in Line 6.

Q. Whereas, the figure of $949,000-odd represents in your opinion, a more accurate comparison? A. In my opinion it represents a more accurate opinion.

Q. And you have given the reasons based on these three factors that you have talked about? A. I have.

Q. And again to make it clear you have taken as a basis for this opinion, in addition to those three factors, and in every other respect, what Leidesdorf used? A. I have.

Q. So that if Hanover had actually purchased all the machinery dealt with by it in this period, in your judgment even on the Leidesdorf assumptions, [1390] a correct economic consequence would be that the purchase would have cost it $949,000 more than it actually spent for leasing? A. That is correct.

Q. Now, in these assumptions which you have reflected in your exhibits—withdrawn.

Mr. Carson: At this time, your Honor, I think I will offer in evidence Defendant's Exhibit D-52 for identification.

Mr. Hayes: Same objection, your Honor.

The Court: Overruled, it will be admitted.

(Defendant's Exhibit 52 was received in evidence.)

Q. In dealing with the Leidesdorf calculations as some of your exhibits reflect you have used, have you, the Consumer Price Index? A. Leidesdorf used the Consumer Price Index, and as a consequence in using their figures I have adopted the Consumer Price Index.

Q. In your opinion, as an economist, is the Consumer Price Index a proper index or a proper method for the comparison of machinery prices in 1955 with prior years? A. It is not.

[1391] Q. Will you tell the court why not, in your opinion? A. The Consumer Price Index, published by the Bureau of Labor Statistics, regularly attempts to measure the cost of living for wage earners, clerical workers. It is an index of the prices of the commodities that wage earners and clerical workers purchase as their cost of living. The index is constructed to measure the reflection of the cost of those items: Food, clothing, toys, and a variety of other items that go into the cost of living of a wage-earning family.

The index is constructed to give appropriate weight to each of these items to the extent that they go into the living costs of a typical wage-earning family. For example, the weight given to the cost—the prices of food in constructing this index is about 40% of the total and reflects the costs of the—the changes in the cost of food. Similarly, the cost of

clothing, as I recall, amounts to about 18%, the weight given in arriving at this index, and rents, for example.

These are not factors that are relevant to the conversion of the prices of shoe machinery [1392] in the year 1955 back to what shoe machinery would have cost in an earlier year.

Now, the cost of food is, at the least, of slight relevance to the conversion of the cost of shoe machinery. The forces and factors that determine the cost of shoe machinery are not necessarily the same that determine the cost of food, and as a consequence, it seems to me that at very best this is a crude way of converting the prices back. I would consider it an improper use of the Consumer Price Index.

* * *

[1467] *Cross Examination By Mr. Hayes* (Continued):

Q. Dr. Corson, you are still associated, are you not, with McKinsey & Company? A. I am.

Q. Is that your full-time employment or not? A. It is not.

Q. What other employments do you have? A. As I testified yesterday, I am a member of the Princeton University faculty.

Q. Do you teach regular courses at Princeton? A. I do.

Q. What courses? A. I teach a course in practices and processes [1468] of management, a graduate seminar.

Q. A graduate seminar? A. Yes.

Q. How long have you been doing that? A. Since September 15—since the opening of school in fall.

Q. Just this fall? A. Yes.

Q. Since you left the University of Richmond, have you taught full-time courses in any other Universities? A. I testified yesterday that I had taught at the University of

Richmond and had been head of the economics department of that institution.

Q. I said since you left the University of Richmond. A. Excuse me. Since then I have not taught full time.

Q. You were a visiting professor at American University? A. I was.

Q. When was that? A. I can't tell you. I think it was in the years of '40 to '51 or '52, in that neighborhood. It [1469] was the latter part of World War II, to the early Fifties.

Q. Was that your sole employment at the time? A. No.

Q. With whom else were you associated at that time? A. During World War II I was associated with the United States Employment Service and subsequently I was Deputy Director of UNRRA, and after World War II I was an executive in the Washington Post in charge of their market research programs, among other things.

Q. What did you teach at the American University? A. As I recall, I taught courses there in the economics of social security.

Q. When were you at George Washington University? A. As I recall, I taught there, off and on, in the early Fifties; probably two to four years.

Q. And what courses? A. There I think I taught a course in the economics of social security—I don't know. I can't recall what else I taught there.

Q. When were you with Columbia? [1470] A. In the early Fifties. I have forgotten whether my title was visiting lecturer or visiting professor. I taught for two years in the Columbia Graduate School.

Q. What subject? A. The economics of social security again.

Q. When were you at Cornell? A. In the years '55, '56, I think—'54 to '56, thereabouts.

Q. Were you visiting lecturer there? A. I was visiting professor on the faculty.

Q. What subject? A. I taught the economics of business policy.

Q. Where do you reside? A. I reside in Princeton, now.

Q. Princeton, New Jersey? A. Princeton, New Jersey.

Q. I think you testified that you have been working for nine months on the analyses which eventuated in the schedules you produced yesterday and in the testimony you gave yesterday. A. I testified nine months, but actually, in looking at my records overnight, it was more than that, it was at least a year, and of course during that year [1471] I had other engagements that took my time.

Q. I wasn't trying to suggest that it was full time, Doctor.

Did you have before you in connection with your studies various S. D. Leidesdorf reports as they were prepared and produced and delivered to the defendant? A. I had various—I am sure I didn't have them all, but I have various Leidesdorf reports.

Q. How many did you have? A. I can't tell you exactly. I would say four or five.

Q. Did you notice that so far as the 20 major machine types are concerned, one of them was based on a 15-year life? A. That is correct.

Q. And one of them was based on a so-called Joel Dean's lives? A. That is correct.

Q. Those were lives that were recommended by Joel Dean at the time of the conclusion of the United Shoe case in Boston? A. Actually, I think one of them was based on

part Joel Dean's lives, and in eight cases on other [1472] lives.

Q. On 15 years? A. I have forgotten exactly, without looking at the document.

Q. Did you see any Leidesdorf reports dealing with the 38 minor machines? A. I saw them. They came along later, as I recall.

Q. Did you make any studies on those reports? A. I studied those reports but I have not made any tabulations on those reports.

* * *

[1501] Q. Now, do I understand your testimony correctly, Doctor, that your criticisms of the Leidesdorf approach—and I think you said it applied to all of the reports that were brought to your attention—were aside from your quarrel with the consumer's price index that the Leidesdorf calculations didn't provide for capital cost, as you called it, didn't take account of the future worth of investment, and didn't allow for taxes, is that correct? [1502] A. That is correct.

Q. Are those the only criticisms you have of the Leidesdorf approach, if I may so use the phrase? A. Those are the significant ones. I have made the criticism of the use of the index.

Q. I mentioned that. A. Those are——

Q. Otherwise the approach you would not quarrel with, is that correct? A. Well, it seems to me those are adequate to damn the approach.

Q. Whether they are adequate or not, Doctor, will you please try to answer the question I put to you? A. I will gladly do my best, Mr. Hayes.

Q. Aside from those objections, you have no quarrel with the Leidesdorf approach? A. I am not willing to

state that I have no quarrel with it. I think that it is—the assumptions are so incomplete that I am not willing to say I have no quarrel with it. It is a useless exercise.

Q. By the assumptions being incomplete, you are referring to the very four items I mentioned, [1503] aren't you? A. That's correct.

Q. Now, aside from that incompleteness to which you refer, have you any quarrel with the method used in the Leidesdorf calculations? A. Well, it is simply a mathematical exercise after that and I have no quarrel with the mathematics in those computations.

Q. Well, let's see if we can get to something more than mathematical, Doctor. Would you have any quarrel in determining whether or not damage had been sustained in taking a 1955 price and applying a proper index, whatever it is, to arrive at a '39 price? A. I think it's an artificial look, but I suppose in this proceeding it is an essential.

[1504] Q. Assuming a proper index, do you see anything improper in deducting from the cost thus arrived at the salvage value at the end of the useful life in order to arrive at the real cost? A. If in the deduction of that salvage value some recognition is taken of, A, depreciation and, B, capital gains, no.

Q. Those are again the things that you talked about? A. Yes.

Q. And do you see anything wrong in comparing the rents and royalties actually paid that went out of pocket with what would have gone out of pocket if there had been ownership in order to arrive at a damage figure? A. If you have a fair comparison, which you don't in those computations.

Q. Because of the elements you mentioned? A. That's right.

Q. Aside from those elements, you have a quarrel with the Leidesdorf calculation? A. I made perfectly clear another one yesterday, which you have not mentioned.

Q. What was that? [1505] A. That is in the determination of the number of machines that actually were purchased and disposed of. The disposals is a mere arithmetical calculation; it is not in fact the number leased by Hanover and returned.

Q. You mean because of the assumption of the length of life did not actually jibe in with the actual shipments and deliveries? A. That is correct.

Q. Did you make two calculations to see which was more favorable to United? A. No. That was not my purpose.

Q. Do you know that if the actual shipments and returns had been used the damage figure would be higher? A. I would have to see the figures to accept that. I do not know.

Q. You don't know? A. No.

Q. That is the simple answer to the question, isn't it, Doctor? A. It is.

* * *

[1507] Q. Does there exist any known, recognized price index for shoe machinery? A. No.

Q. Thank you.

[1508] Do you have Defendant's Exhibit 52 before you? That is your Table VII. A. Yes, I have it.

Q. Let me ask you a preliminary question. I notice that on this particular exhibit, as distinct from, I think, all of the others, there is pasted on below the caption, and again about midway down, sheets, little slips, with typewriting on them. Do you see those? A. Yes.

Q. And the upper one refers to Leidesdorf's fourth computation. What is that? A. In Leidesdorf's letter of April 19, 1961, addressed to Donovan, Leisure, Newton & Irvine, "Gentlemen: In acordance with your request we have made a fourth computation."

Q. That is Exhibit 41? A. Yes.

Q. Did you prepare a tabulation similar to those offered yesterday with respect to the other Leidesdorf tabulations? A. I am trying to recall. I think we did with respect to the third computation but I don't have those computations. To the best of my knowledge, they [1509] reveal substantially the same picture and I thought it would be clearer to focus on one of these rather than on any other, but they—I think in answer to a question by Mr. Carson yesterday I made the point that regardless of the variation in assumption they do not overcome the three deficiencies I am trying to illustrate by these exhibits.

Q. The decision to use Plaintiff's Exhibit 41 was your decision, Doctor? A. It was my decision.

Q. Alone? A. Alone, yes.

Mr. Hayes: Do you have a copy of Exhibit 52, your Honor?

The Court: Yes.

Q. If you will look at Defendant's Exhibit 52, Dr. Corson, as I understand it there is here a comparison of what you set forth as the Leidesdorf figures taken from Plaintiff's Exhibit 41, and the figure arrived at by relating the economic costs of leasing, as you computed them, and the economic costs of ownership as you computed them, and showing, according to your computation, that there was an excess of costs of ownership over costs of leasing of $949,000? [1510] A. That is correct.

Q. Do you mean by that that as a consequence of leasing instead of owning Hanover has made a profit of $949,000? A. I would not use your words, but I would reach the same conclusion. I have not said that they made a profit; I have said it was more advantageous to Hanover to cease than to own.

Q. It is not a profit figure? A. I have not attempted to suggest that it was a profit figure.

Q. I know that. I want to know now whether you consider it a profit figure or not. Did Hanover make a profit of $949,000 by leasing instead of being able to buy the machines? A. I don't know what you mean by "making a profit" in this context, but I will say no, it did not.

Q. You know what a profit is? A. I have an idea what a profit is.

Q. That if you buy a watch for $5 and sell it for $10, you have a profit of $5? A. If you have not kept it an awfully long time and kept your $10 tied up.

Q. You still have a profit of $5. [1511] A. It would depend on how long you kept it and what rate you borrowed the money for the $10?

Q. I didn't borrow any money; I just bought a watch for $5, kept it 10 years and sold it for $10. Did I have a $5 profit? A. No.

Q. I did not, you say? A. No.

Q. Will you tell me what my profit was? A. I have no idea.

Q. But it wasn't $5?. A. That's right.

Q. I wouldn't have to report $5 on my income tax return as a profit? A. No, I shouldn't think so.

Q. You wouldn't think so? A. No.

Q. You are not a tax expert, too, are you? A. No.

The Court: We are getting into a far field, I suppose, to determine whether the watch was used

in business or whether it was personal and whether it was depreciated?

Mr. Carson: Whether it kept time. We [1512] are wasting it now.

Mr. Hayes: I guess every time I am on my feet you waste time, Mr. Carson.

Q. As I understand Defendant's Exhibit 52, and please correct me if I am wrong, and particularly the lower part, the calculation of economic costs of leasing and economic costs of ownership—those figures in those two lines and the differences shown represent a projection as of 1939, assuming in 1939 Hanover Shoe had all of the knowledge that is now available as of the end of 1955, and what the effect would be if it were to get a 14% return on the investment it made in 1939, is that correct? A. I wouldn't put it in those words, but you are substantially correct.

Q. Well, I didn't misunderstand you.

* * *

[1513] Q. Now, still referring to Exhibit 52, Dr. Corson, the largest single factor in bringing about this difference of $949,000 is the use of the 14% cost of capital that you talk about, is it not? A. I suspect it is a major factor. I don't know the relative weight of these.

Q. Now if a different percentage were used, the figures would differ, would they not? A. Yes.

Q. If you had used 10%, for example, ? I made a rough calculation, they would about balance, w uldn't they? A. I don't know that to be the case.

Q. You don't know. But it would be—if you use a 10% so-called cost of capital, the difference would be substantially affected toward a point of non-existence; is that correct? A. It certainly would differ.

Q. And if you use 6%, to go still further, and there would possibly be an excess of the so-called economic cost of leasing over the so-called economic cost of capital? A. This might be, I don't know it to be the case.

[1514] Q. I hope my arithmetic last night was accurate. It's a rough calculation.

Of ownership, I should have said. Mr. O'Malley reminds me that I said economic cost of capital. I should have said economic cost of ownership, to use the witness' phrase.

Now, you used 14%, and you told us yesterday why you used it with reference to Exhibit D-47, and that's your Table I, if you will look at it—do you have it in front of you? A. I think I would amend your statement to say that it's the whole of D-47, rather than just Table I.

Q. I am sorry, you are correct. Table I with an appendix to Table I and Table II? A. That's correct.

Q. Now, in Table I, you arrive at a cost of capital which I think you stated averaged out to 22.14%, weighted out, is that correct? A. That is correct.

Q. And on Table II, which is the third page, you arrived at a cost of capital which I believe you said averaged 14.1%? A. That is correct. I think it was—yes, [1515] 14.1 I think is correct.

Q. Now this Table I, you arrived at this so-called cost of capital, and if I recall your testimony it was to the effect, that in each of these years, '40 through '51—not each of them but in the seven or eight years set forth there, Hanover sold varying quantities of stock to, I believe you said—yes, it's headed, "Members of the Corporate Family." Who are the members of the corporate family? A. I explained in making that statement yesterday that the ownership of Hanover Shoe, Inc., prior to 1956, was closely held and that the ownership was in the hands, I understand, of those who

were simultaneously serving as corporate officials, and this was all the meaning I had in mind by the use of the term the "corporate family."

Q. You mean the existing owners of the stock of the corporation? A. That is right.

Q. Would your evaluation of the cost of capital on Table I be changed if you were to be told that in each of the years substantial quantities of those sales were to employees? A. It would not change my opinion at all.

[1516] Q. They would not be existing stockholders prior to the purchases? A. The price at which it was sold would have been determined by the board of directors, regardless of whether it was sold, in addition to those who served on that board, to employees.

Q. In, for example, the year 1948, which is the highest percentage you showed for a sale of 5536 shares, if all of those shares were sold to employees of the company—pardon me, if 4200 of those shares were sold to employees of the company; not related to any of the existing stockholders, would you still maintain that the cost of capital for that year was 54.5%? A. Assuredly.

Q. Assuredly. I thought you would, Doctor. It doesn't occur to you as a possibility that Hanover might have been desirous of selling stock to key employees at low cost to them? A. It hadn't occurred to me, no.

Q. Is it a possibility that you might recognize; is it something that's done fairly frequently in corporations? A. It could be.

[1517] Q. And that would not represent the true cost of capital then, would it? A. I would think it represented the true cost of capital.

Q. Even though the motives the management had was to insure that employees stayed with it rather than to get a particular price for the stock? A. That is correct.

Q. Now you take these and you average them as I mentioned.

Now, let's turn to Table II. Table II, you arrive at a rate of return. You arrive at that by dividing the net profit after tax by the stockholders' equity. Now the rate of return you say is cost of capital; am I correct? A. I think I said that it is another indication of the cost of capital, and you will recall that I stated that the cost of capital for Hanover as a range from 14 to 22, I have consistently used the lowest of those figures.

Q. The lowest permissible cost of capital by your standard was 14%? A. That is my testimony.

Q. And in the year 1947, on Table II, Hanover [1518] had the largest profit in its history, did it not? A. That is correct.

Q. It was almost a 33% return on the investment? A. That is correct.

Q. And therefore, you say the capital cost 33% for that year? A. This is a factor to be taken into account.

Q. There were, of course, no public sales of Hanover stock to which you could refer to see what the market would be paying for it, were there? A. There were not.

Q. And isn't it a common practice in determining cost of capital among economists to look toward the market behavior, what does the market pay for the stock? A. That is correct.

Q. You have no opinion, I take it, Doctor, as to what the market would have paid for Hanover stock in 1947, if it were freely traded? A. I ventured no opinion.

Q. You are just taking Hanover's figures? A. That is correct.

Q. Would your view as to this so-called indication of cost of capital, if I were to tell you there [1519] was an

agreement among the stockholders of Hanover that they would sell only among themselves or to the corporation and that the price at which they would sell would at all times be the book value except that inventory would be valued at 85% of the book value. A. It would not change my opinion, but it would lend a special credence to Table I.

Q. A special credence, you mean Table I becomes even stronger in your opinion? A. In my opinion it does.

Q. Even though each year the net worth of Hanover increased? A. That is correct.

Q. Now, I think you told us before the recess that Exhibit 52, which is your summary sheet, was in the nature really of a forecast that was being made, possessed of all the facts that you had down to 1955? A. Well, the word "forecast" was your statement. I wouldn't particularly use that term. I have attempted to put together in retrospect, as I emphasized on yesterday, what data there is.

Q. But it would be—it's in the form of what would be forecast if in 1939 Hanover attended [1520] Dr. Corson and asked him if they should buy or sell and you, of course, had all the facts down to 1955? A. It is the kind of analysis I would make.

Q. At that time? A. At that time.

Q. Now, the closest year of Table I, to 1939, was 1940, where you show indication of cost of capital of 7.8%, and since Hanover was faced with the necessity, under assumptions of making the purchase in 1939, why did you not use 7.8%? A. In the first place, there are two reasons, one is that in 1939, if as you are suggesting, this analysis were to have been made, one would have taken into account the costs of capital in the years preceding that period, rather than in the year succeeding it; secondly that capital that is involved here was capital that was employed not just in the

year 1939; it was employed in each of the years through '55. As a consequence, it seems to me that the appropriate figure to take into account is the best approximation one can arrive at as to the cost of capital throughout this period, rather than in the particular year. [1521] Q. If in 1939 you had been retained by the Hanover management and you had Table I—you would not have 1940—you would not have the knowledge as to what happened in the future and would you not take the then current cost of capital? A. If I were really thinking about it, assuredly not, and it would seem to me that it would be essential that any businessman, as well as any economist, and particularly in the year 1939, with the outbreak of war—one would take into account not only what had immediately been past but what was expected.

You are making a decision in the purchase of whether it be a building or shoe machinery—as to what the return and what the expenses are going to be over a time in the future.

Q. If in 1939 again you retain—and now I refer to Table II—your indication of cost of capital, which I think is your phrase, for 1939 was 7.7 per cent, and in 1940 it was 7.94 per cent—if at that time without the knowledge of what the future holds you were making a similar calculation, would you not use these percentages? A. I would not.

[1522] Q. Why not? A. For the same reason I have just stated.

Q. Even if you were deprived of the knowledge of what was going to happen in the years subsequent to 1940? A. That is correct. My experience as a consultant would suggest that I woudn't be retained often if I had made such a prognostication.

Q. What you have done here is taken a 16-year period, arrived at the rate of return without knowledge as to how

much the market would have paid for Hanover stock, found a 14 per cent average and said, "That is the figure I shall use"? Isn't that what you have done? A. Yes, but may I add a word of explanation?

Q. Add anything you please, Doctor. A. I place a special credence, as I tried to make out yesterday, in the fact that in Table I you have essentially the price that Hanover's corporate officials who were simultaneously stockholders were charging the corporation for additional capital they supplied at each of these successive plans. This is the closest approximation to the market for this stock of this company.

[1523] Q. I tried to make clear to you that in each of these years the bulk of the sales were not to corporate officials who were stockholders; they were to employees.

I think you agreed that corporations do at times sell stock below the real value in order to keep key employees in their employ? A. Is that a question? May I respond to it?

Q. Certainly. A. They were charging this price to those employees or to whoever else bought that stock. That is the only concern I have here: What was the cost of the capital that they obtained.

Q. It was a bargain price in each instance, wasn't it? A. I thought earlier you were suggesting that 14 per cent was relatively high, that if I had used a lower figure—if it is a bargain price, it averages 22 per cent.

Q. Wasn't it a bargain price? A. By your terms. It is your suggestion that it is a bargain price and I do not know those facts so I can't deny it.

Q. Well, for example, in 1948, according to [1524] Table I, the stock was sold at $26.33 a share and if you look at your Table III for that year, you found that the profit—that there was [illegible]8 per cent return that year.

Mr. Carson: You mean Table II?
Mr. Hayes: Table II. I am sorry.

Q. There was a 28 per cent return that year, or more than one-quarter of the investment for the company with the stability of Hanover. Would you not say that was a bargain price? A. That sounds like a good price.

Q. It certainly does. You referred several times yesterday to the Anthony and Dean books and to the tabulations they made. When they in 1954 were preparing the tabulations and their estimates, both of them used, in order to determine a cost of capital for the industry, the available market figures of corporations where there was stock publicly outstanding, isn't that right? A. That is correct.

Q. Isn't that the usual approach? A. Wherever such is available.

Q. And where it is not available what is the usual approach? [1525] A. I think I have here used what is the usual approach.

Q. Isn't the usual approach to get the most similar companies one can get and find out how the market has treated them? A. It is an approach but it is subject to very considerable difficulty. You would have me justify each individual company that I would claim was comparable if I were to have used such an approach and it would be very difficult to do.

Q. Let me ask you another thing: Is it your testimony that the lowest cost of capital here is 14 per cent? A. In the light of these figures, this seems to me to be the best approximation one can make of the lowest cost of capital.

Q. Would you agree that a dozen different economists could treat with the same statistical data and come up with a dozen different answers? A. No.

Q. You would not? A. No.

Q. I read to you from a work by Joel Dean, and that is the same Professor Dean, called "Managerial [1526] Economics," published by Prentice-Hall.

At page 576, Professor Dean says—are you acquainted with this book? A. Yes, I know that book.

Q. "Cost of debt capital raises future important problems since bond prices depend on a fairly narrow range of factors and are dominated by the government bond markets. As a result, estimates of debt cost can be made highly precise in comparison to the uncertainties of estimating cost of equity capital and when debt and equity are combined to find the total cost of capital errors in interest cost estimates are negligible. The cost of equity capital is a much more tenuous quantity as the behavior of the stock market demonstrates. The basic difficulty is that stock prices are mere speculation about the future and depends on factors that have no statistical gauge. An estimate of the cost of equity capital based on statistical analysis thus relies on broad assumptions of the relevance of measurable current and historical data to market expectations. Estimates of cost of capital can frequently be made more economically by following market behavior directly instead of by analysis of such controlling factors and gross trends, [1527] sales volatility and so forth. Thus for an established company whose stock is well known and heavily traded the practical problem is to forecast what the stock will sell for at the time the new issue is to be floated. Such a projection is often based on recent market value of the stock, and the new issue will not alter the investment character of the stock, and then for companies whose stock has no active market or no market at all, market values may be estimates by statistical analysis of comparable companies."

There is no suggestion there, is there, of using the statistics of the company itself to arrive at its cost of capital? A. No, but that is an excellent statement in support of the reasoning I have advanced in this case. It is the most helpful statement I could ask for.

Q. I am directing myself strictly to your use of Hanover's figures. A. Precisely. In this instance——

Q. Instead of going to find comparable companies, and you agree that Professor Dean does not suggest that the cost of capital of a closely-held company be estimated by analysis of its own figures, [1528] does he? A. That is an inexact and inaccurate interpretation of the words you have just read.

Q. All right, you point out the inexactness and the inaccuracy, Doctor?

Mr. Carson: Would you let him see the language?

Mr. Hayes: Oh, certainly. If he can find anything in the book to support his use of Hanover's figures alone, I would be happy to see it.

A. "Estimates of cost of capital can frequently be made more economically by following market behavior directly instead of by analysis of such controlling factors as gross trends, sales volatility and so forth."

There is no use of any such data in this instance.

Secondly, ". . . for companies whose stock has no active market or no market at all, market values may be estimates by statistical analysis of comparable companies," if that need be done. I am adding "if that need be done."

Q. That is not in Dr. Dean's book? A. It is not. In this instance, as has been [1529] repeatedly stated, this is a re-

trospective look at what was the case. There is no need to forecast in 1939 what would have been the case.

We are here dealing, as the Leidesdorf computations deal, as the assumption prepared by your firm deal, with what we assume to be the case. I am making no assumption in this instance; I am taking the figures that Hanover has supplied and in this instance we have as a basis for determining a cost of capital reliable data rather than any sheer estimate of comparable companies or of Hanover's own situation.

Q. Is that your answer? A. Joel Dean, I suspect, confronted with the same situation, would have followed the same approach.

Q. That is your answer? A. That is my answer.

Q. If I recall rightly, I gave you an instance of a dozen different economists and you said they wouldn't come up with different answers? A. In this situation.

Q. I read you from Bierman & Smidt, which you referred to yesterday, at page 139. This is under the relevance of cost of capital. You have the book before you

[1530] "A person who desires neat solutions with one correct answer should avoid the computation of a corporation's cost of capital. Usually such an answer is impossible. If ten 'experts' independently computed the cost of capital of the IBM Corporation there would be ten answers."

What is your comment on that? A. Well, simply that I don't agree. I recognize, as my testimony should make clear, that the estimation of the cost of capital is assuredly no exact science and in suggesting a range of from 14 to 22 per cent, I surely made that explicit and in using the most conservative of those figures in all of my calculations

I hope I underlined that fact. I think that these authors overstate the point a bit, but only a bit.

Q. You are somewhat in disagreement with Bierman & Smidt on that point at least? A. Yes.

Q. That is the authority you supplied us? A. That is correct.

[1531] Q. And this is the authority you supplied us? A. Yes.

Q. You do take the position, and you do take the position in this case, however, that Hanover's cost of capital must be calculated at not less than 14%; is that correct? A. That is my opinion.

Q. Now I go on in Bierman's book to the following page:

> "The satisfactory definition of cost of capital is necessary in guiding the internal investment policies of corporate management. The choice of investments represents a strategic decision for the management of a firm since in large part the choices made now will influence the future course of the firm's development. It is not surprising to find that implicit in any decision of a cost of capital to guide investment policies, is a judgment as to the goals toward which the firm is or should be striving. The goals determine the appropriate definition of capital cost. Certainly, we cannot assume without proof that seemingly different goals will lead to identical definitions of [1532] cost of capital."

What is your comment on that statement, Doctor? A. I have no comment on it.

Q. Well, let me ask you a question then referring to Exhibit 47, Table I. Do you know what the corporate goals

were of management when they sold the stock at those prices? A. I do not, but I do know that this statement applies again to a prospective look forward which is the businessman's usual situation, and in these proceedings, we are not concerned with a prospective look forward in which we must take into account whatever the goals may be; we are concerned with a retrospective look that looks back without regard to whatever the goals may have been, and yet puts together such evidence as is available as to what was the case.

Q. Have you finished? A. I have.

Q. My question was directed to Table 47—pardon me, Table I, in Exhibit 47.

Is it not a fact that in each of the years when Hanover sold stock to these employees, it was taking a prospective look? [1533] A. This may be the case. You have supplied the facts that I know nothing of that they sold stock to employees. You are supplying the fact that this was the motive. I do not know this to be the case. I regard it as irrelevant to this table if it were.

Q. Assume it is a fact, Doctor, and that the corporate goal was to maintain these people in their employment, was not Hanover each time it sold stock to them taking a prospective look? A. This may be the case.

Q. And if that be so, one could form different judgments with respect to the cost of capital prospectively, that you have set forth on Exhibit 47, could not one? A. One could not.

Q. One could not.

The Court: At this point, Mr. Hayes, are you going to put in evidence the agreement you referred to?

Mr. Hayes: Yes, I am. I could put it in right now.

* * *

[1534] Q. Assuming, Doctor, that Hanover in fact had an established market for the stock throughout this period, and the corporation sold to key employees directly at say half the market price; how would you treat that in determining the cost of capital? A. In determining the cost of capital, when one has advantage of looking back over the 16 years, [1535] I can only be guided by what it was.

Q. Now, will you answer the question. A. The answer to the question should be clear from those words.

Q. I am afraid it is not clear to me, Doctor. I told you yesterday I am on the dull side. A. Would you restate the question for me, please?

Mr. Hayes: Would you read it, please.

(Question read.)

A. In determining the cost of capital in this case I would not take that into account.

The Court: I understand what you mean by that is that it doesn't make any difference what the stock was worth, the people paid so much for it?

The Witness: That is precisely what I am saying.

Q. Now, this 14% which you have treated as the cost of capital, let me see if I get your reasoning, Doctor. Are you saying in substance, since you used Table II in Exhibit 47, that Hanover on any investment had to make 14%; if it didn't, it was not a good investment? A. That would be my judgment.

[1536] Q. That is the substance of it. A. That is my judgment.

Q. They are sort of under an obligation to itself to earn 14%? A. The capital having cost them 14% it would seem to me to be an unwise business judgment——

Q. When you say "cost" just what do you mean, Doctor? It is not "cost" in the sense they have paid out money, is it? A. It's cost in the sense that they paid out money, if you look at Table I.

Q. Who paid out money there, the stockholders, didn't they? A. Yes, and the earnings that they expected on that return, on that money, remitted the cost.

Q. Now, I am talking about the word "cost" as you use it. You don't mean the word "expense," do you? A. I mean an economic cost.

Q. You don't mean "cost" in an accounting sense that would enter into the profit and loss statement? A. Not an out-of-pocket expenditure.

Q. That's right. This is an economic concept, [1537] is it not? A. It is.

Q. And it would never enter into the profit and loss statement of a company, would it? A. In the long run, of course, it does.

Q. I am talking about the profit and loss statement currently. A. In any individual year one might find difficulty over a year.

Q. Now, do the costs of capital vary with the differing goals a corporation may have? A. Oh, yes. I wouldn't quarrel with that.

Q. And if the goal of Hanover was to keep these employees in its employ by giving them stock at bargain rates, why shouldn't the cost of capital—of the whole outstanding stock—be determined by the bargain rate given to an em-

ployee? A. It would seem to me that again all I can answer to this hypothetical question is that I am dealing only with what the records indicate the cost of capital was. Taking into account all the goals of this company, and having the advantage of looking back over 16 years, I have simply tried to reproduce here what data there is to reflect what [1538] the cost was, and in that sense, it reflects whatever goals were employed in the decisions made.

Q. Now, the approach in this case, as you have undoubtedly been advised, is that Hanover claims it was damaged by not being permitted to buy the lease-only machines in 1939. You have been told that? A. I have been told that.

Q. And that Leidesdorf calculations were put in as evidence of the extent of that damage; you have been told that, have you not? A. I have been told that, yes.

Q. Now, in 1939, Hanover did not and could not know at what prices its own stock would be sold to its employees in later years, could it? A. No.

Q. And Hanover did not and could not know how much it would make on every dollar of invested capital for the next 16 years, is that not correct? A. That is correct.

Q. So that so far as Hanover was concerned in 1939, assuming it had the ability to buy, it had to make its decision then, correct? A. That is correct.

Q. Without reference to the factors which [1539] came into being over a period of 16 subsequent years? A. Any businessman in making such a decision attempt to forecast over the time period for which the investment is involved, the conditions that will obtain.

Q. He doesn't know them, he is guessing at them, is he not, be it an intelligent guess or not? A. It can be a

very reliable guess in a well-managed company, as I assume Hanover was.

Q. You are not suggesting that in 1939 the management of Hanover knew all the figures that are set forth in your tabulations, or could know them? A. I am not.

Q. I didn't think you were suggesting that, Doctor.

Now, did there come a time, to your knowledge, when some Hanover stock was sold to the public? A. I believe that was the case in 1956.

Q. I am sorry? A. A point beyond the period covered here.

Q. That's right. Were you acquainted with the facts of that public issue? A. I was at one time. I frankly don't recall them at the moment.

[1540] Q. Have you seen the prospectus? A. I don't believe I ever saw the prospectus.

Q. Do you know at what price the stock was sold? A. I did at one time, but I do not recall, to be truthful.

Q. I show you Defendant's Exhibit 1 for identification, "Prospectus" for a secondary issue of 150,000 shares out of 600,000, I believe, which were then issued, a sale by stockholders not by Hanover, and it shows that the sales price the public paid was $25, and the earnings per share were $2.09. Do you see the price per share on the front page, and the earning tabulation is down here, earnings per share. That's about 12 times earnings, roughly, is it not? A. Yes.

Q. Or roughly 8%? A. Yes.

Q. And that was—would you say that was Hanover's cost of capital in 1956, then? A. In the sale of this particular block of stock, but assuredly not the cost of capital as I have defined it.

[1541] Q. If 1956 were included in this damage period would you have included that secondary issue, Doctor? A. Yes.

Q. You would. And you would have included it as the index to the cost of capital, would you not? A. That's right.

Q. Now, actually that was a minority interest, the rest of the stock being closely held. Does the market ordinarily discount stock, a secondary issue, when the majority is held by a small close group? A. I didn't know this was a minority holding, and my answers to your earlier questions would be modified accordingly. They do normally discount the price of a minority holding.

Q. So that if this were a straight issue without having a whole group controlling the company the public could be expected to pay a higher price for the stock; is that correct? A. Now, if I follow your question correctly and perhaps I misunderstand it, I would say it's not correct, but if you would have it read back——

Mr. Hayes: Would you read the question, please?

[1542] (Question read.)

A. If I understand your question, the answer is no, it is not correct.

Q. I thought you said that in the case of a sale of a minority block with a small group controlling the majority, the market is inclined to discount the price? A. That is correct.

Q. Doesn't it necessarily follow, then, that if there were not—if it were not a minority interest, and if there were not a small group controlling the company, the public price could be higher? A. I would expect it to be.

Q. That's right. But, at any rate, it was 12 times, or 8% in 1956? A. That is correct.

Q. And you knew about this, Doctor, and you paid it no consideration because you say it was beyond the damage period? A. That is correct.

Q. Although it was the only instance in the whole history of Hanover where there had been a public issue of stock? A. Had I taken it into account, and this is [1543] my reasoning, I would be subject to the same criticism that you make with respect to taking into account the figures for the whole 16-year period rather than those for the year 1940.

Mr. Hayes: May I have the question, please?

(Question read.)

Q. And that's your answer, Doctor? A. That is my answer.

Q. Now let me continue a bit, if I may, with this 14% I think you testified in substance—I hope I don't improperly phrase what you said, that the use of the 14% was on the assumption that that is what Hanover had to earn? A. That is correct.

Q. And if it didn't, it suffered what you call an economic loss? A. That is correct.

Q. Are you there indulging an assumption, and I don't use the word improperly at all, Doctor, which might be phrased in this fashion: That as against the purchase of machinery in 1939, if Hanover had available to it other opportunities where it would earn 14% and should have turned down the purchase of machinery, and embraced the other opportunities? [1544] A. If they had earned a greater return than the purchase of machinery that would be the logical consequence.

Q. That is the substance of the position, isn't it? A. Yes.

Q. Now, what is your knowledge as to what investment opportunities there were open for Hanover as alternatives to the purchase of machinery in 1939? A. I have no knowledge.

Q. And you don't know whether they would have made out better or not if you were looking at it in 1939, do you? A. I do not.

Q. Suppose in somewhere along this period, 1939, 1940, anywhere—let me ask a preliminary question first. I want to be sure that I have this straight.

Is your position that this 14% so-called cost of capital obtained throughout the period, taking it on an average? A. On an average this is the losses, and remember I have testified that as I see it, these figures indicate that the cost of capital could be [1545] estimated at from 14 to 20%.

Q. I know, I am taking a minimum. A. I am taking the minimum of that range.

Q. I am going along with you on a minimum because your tables are based on this 14%, Doctor. You decided which percentage to use, and I am going along with you. And I think you testified in response to a question by Mr. Carson yesterday, that if Hanover could borrow money at, let's say, 2%, and did, that that would not reduce the cost of capital, that would add to it because it had to pay out interest. A. Particularly—and this is essential to the answer, particularly if this was over and above the capital they already had, whateyer it were being used in.

Q. Over and above the capital. I am sorry, I don't follow this, Doctor. We know what their capital was at all times. I am not thinking of additional capital. A. Well——

Q. Didn't you testify in response to Mr. Carson yesterday, and I may have it wrong, that borrowing money—and I am assuming 2%, I forgot what percentage he used—would only add to the cost [1546] of capital, they still had this 14% cost of capital, and the interest would be an additional charge; didn't you so testify yesterday? A. If they had $1 million in capital in the company at this time, and the average cost of that capital was 14% or let's say $140,000——

Q. Right. A. —then if they borrowed another $100,000 at 2%, the cost would be in addition to that $140,000.

Q. That's what I thought you said.

Now, suppose Hanover had an opportunity to make an investment which would give it, let us say, a 10% return, an investment, let's say, in some other company, and Hanover would be able to borrow the money. Let's assume the investment was $500,000, and they borrowed the $500,000 from banks, and paid it back over a period of years out of their earnings. They paid 2% on the borrowing. Is it your testimony that they would suffer an economic loss? A. Yes.

Q. Actually, they would be making a profit, wouldn't they? A. In the Hanover case it was particularly true that they would have suffered an economic loss.

[1547] Q. But they would be making a profit, in fact, so far as Uncle Sam is concerned, wouldn't they? A. Yes, this is conceivable.

Q. So that your economic loss and your actual profit and loss are not the same, are they, Doctor? A. Well, assuredly, they are not.

Q. And I take it that in the case I supposed and gave you, you would advise Hanover against making that investment? A. I would advise them against making an invest-

ment in which they were employing capital that cost them 14% and in which they were obtaining a return of 10%.

Q. Although the capital they invested they borrowed for 2%? A. In the Hanover case, of course, as has been made clear, they had capital at all times for which they were paying 14%, so that the situation you assume is utterly unrealistic to the proceeding in which we are engaged.

Q. I see. I am sorry I am so unrealistic, Doctor, but to pursue it a bit more: the capital would remain unchanged in the assumption I gave it, they would still be employing it in their business, [1548] but they borrowed $500,000 at 2%, they got the money, they turned it into an investment, the investment paid them 10% a year, they paid out 2% a year, and you say they are suffering a loss? A. Yes. May I try to make it clear to you?

Q. I wish you would, because, frankly, it is not clear to me, Doctor.

The Court: I'd like to hear this but I'd like to say that I am very much confused and interested in this phase of it as to what the cost of capital is, and so go ahead and give any explanation you want, Doctor.

A. My explanation is this: Here was a company that had capital in the business, it was not using that capital efficiently during a large portion of this period, as has been pointed out, it was allowing a goodly portion of this capital to remain idle and relatively unutilized. If one studies the current ratio of current assets to current liabilities, one finds that the ratio in this company over much of this period was quite high.

Not that it was small, they had plenty. Now, to assume that one would go out and borrow additional capital at

whatever the rate, and add that [1549] additional amount of out-of-pocket cost, which would appear on the profit and loss statement, is only to say that they would have had additional costs for capital. The capital that was in there, for which they had ample to buy the machines that were available most of this time, had cost them 14%, and as a consequence, any additional cost that was incurred, as a bank borrowing or what not, to my mind would add to that cost, would not reduce the cost of that capital that was being employed in these machines.

Do I make myself clear?

The Court: I think I understand it now.

Q. I understood the words you used, Doctor. It was clear enough. But there is another problem to me. What you are saying—in the first part of your answer or explanation, was that they had a lot of unused capital around, they didn't need all this capital. But this was a management decision, was it not? A. Yes.

Q. And even today, directors are still supposed to direct a company, are they not? A. This is right, sure.

Q. And they were in 1939? [1550] A. Surely.

Q. And are you now substituting your judgment as to how they should have managed the company for the judgment of the directors? A. No.

Q. That's what it sounded like to me because you said it would be unrealistic, I think was your word, with all this capital lying around for them to go out and borrow money. In the assumption I gave you, they did go out and borrow it. This was their decision, whether it was wise or unwise. Did they make a profit? A. I am not substituting my judgment for the managerial decision; I am substituting my judgment for your judgment. I think it would have been a very unwise managerial decision to have made,

and if it had, it would have added to the total out-of-pocket expenditures in that year.

[1551] Q. It would have added to the total out-of-pocket expenditures. Do you mean that they would have paid this 2% on the $100,000? A. Yes.

Q. What about the $50,000 they would collect? That would be the in-pocket. A. They could have made the same $50,000 with the money they already had in the bank.

Q. Maybe they could, maybe it is unwise, but suppose they did it? I want to find out what the cost to them was. A. I thought I had made that clear.

Q. Are you sticking to your 14% plus interest? A. Yes.

Q. The 14% was not out-of-pocket for Hanover, was it? A. A portion was and a portion was not.

Q. Please explain that. A. That portion that was paid out in dividends each year was an out-of-pocket expenditure.

Q. So now our cost of capital is divided into what is paid out of dividends and what is retained in the company and in the net earnings and added together? [1552] A. Isn't that perfectly clear from Tables I and II?

Q. Maybe it is. I told you I am not an economist. That is why I solicit your patience, as I did yesterday. I find these concepts extremely difficult. Actually there was no cost in the real sense of the term of out-of-pocket expenditure deductible on the tax return of 14%, was there? A. No.

Q. None at all? A. No.

Q. And in no year did any item representing that 14% or any portion of it appear on the tax return? A. No. It appeared on the records of sales of common stock, in each instance.

* * *

[1553] Q. Just before the recess, Dr. Corson, we were discussing the case about Hanover owing money.

In the course of our discussion you mentioned the highly liquid condition of the Hanover Company over the years, the strong cash position, and so on.

Suppose Hanover at any point during this period without borrowing invested $500,000 of its surplus funds in anything, X, and received a 10 per cent return on its investment, $50,000 a year; do I understand your testimony to be that they would suffer a 4 per cent economic loss? A. They would have had a better utilization of the capital they had, but they would not have utilized it at a return commensurate with what it was costing them. To that extent, yes, they would have suffered a loss on that additional investment.

Q. Even though they were not using the funds [1554] for anything else? A. Yes.

Q. Actually, as far as Uncle Sam is concerned, they would be making $50,000 a year of income, wouldn't they?

Mr. Carson: Objection. I don't know what this "so far as Uncle Sam" refers to. Is this income tax?

The Court: You better rephrase your question.

Mr. Hayes: I thought the witness used "Uncle Sam" and I was adopting his terminology.

Q. So far as the liability to pay taxes might be concerned, they would be reporting $50,000 additional income each year? A. Assuming that the circumstances you described were the case.

Q. And these are funds that they were not otherwise utilizing, we will assume that? A. If that is the case.

Q. But by your approach they would be suffering a 4 per cent economic loss? A. That is correct.

Q. That would not be an actual loss? [1555] A. In the long run it would be a real loss.

Q. It wouldn't be a dollar and cents loss in any one year? A. In the long run it would.

Q. Would you please explain that? A. There is a limit to how many times one can invest capital that cost 14 per cent and get a return of only 10 per cent. As long as one had additional capital that was not being utilized and was earning nothing, yes, this would have been the case, but if one continues this in the long run this is a net loss.

Q. And if they continue to make throughout the years, aside from this investment, 14 per cent return, exclusive of the investment, so that their capital would still remain a cost of 14 per cent, and on this investment they would make only 10 per cent, you say there would come a time when they would exhaust their capital? A. Let me put it more precisely: Over the years there would be reflected a gradual reduction in the rate of earnings on the stockholders' equity and in that sense there would be a loss, and in no other sense.

Q. So that the rate of return would go down [1556] overall? A. The rate of return on the stockholders' equity would go down by virtue of an unprofitable or an uneconomic investment.

Q. You didn't mean "unprofitable"? You changed that to "uneconomic"? A. Yes.

Q. Let's suppose it brought it down to a 13 per cent return overall, then their cost of capital becomes 13 per cent? A. Their cost of capital was not measured by that alone and the 14 per cent figure was not measured by that alone.

Q. I understand that. I am assuming over the years that as a result of this investment on which they got 10 per

cent their return equity overall became 13 instead of 14 and that would mean their cost of capital, as a consequence, would be 13 per cent instead of 14 per cent? A. It would not.

Q. Wouldn't it? A. No.

Q. Why wouldn't it? A. You said you understood it and I thought [1557] your question made clear that you didn't. I have taken into account in Tables I and II not alone that factor to which you are now referring; I have taken into account, and particularly as I have tried to emphasize, the price that Hanover's corporate stockholders charged Hanover for the capital that they supplied.

This, to my mind, is a particularly relevant indication of what the cost of Hanover's capital was.

Q. Maybe I didn't make my question clear, Doctor. They had a 14 per cent, according to your assumption, cost of capital. Now if, during this period, they used the surplus funds on which overall they had a 14 per cent return, they used the surplus funds and on those surplus funds they made only 10 per cent, that would tend to depress, would it not, the total income? A. That is right.

Q. And let's assume now that it would depress it to the extent of 1 per cent, so that you had 13 per cent. Now, with that assumption, so that you could come up with a 13 per cent return, wouldn't that mean that 13 per cent is the cost of capital? A. I answered that question before, no. I [1558] repeat the no.

Q. You are referring now entirely to Table I? A. I have said that in arriving at an estimate of the cost of capital, in my estimate was the cost of capital ranged from 14 per cent to 22 per cent, that that was, the fact to which

you are alluding was one that I took into account, but I have said that the one to which I place especial credence is the one reflected in Table I.

Q. Which is the 22 percent? A. This is correct.

Q. But your tabulations are based on the 14 per cent, are they not? A. As I tried to make clear, I used the most conservative estimate.

Q. It is to that estimate that I am addressing the question; I am not addressing it to Table I. I am addressing it to your tabulations. Is that clear? A. Yes, that is clear.

Q. Fine. Now, that being clear, will you answer the question I put to you? Don't bring in Table I, please. I am talking about Table II, I think it is, and your calculations.

[1559] Mr. Carson: May we have the question so stated or read.

Mr. Hayes: I think it is easier for me to restate it, and it is faster.

Q. Talking about your 14 per cent cost of capital which is based on the earnings ratio, if Hanover used some of its surplus funds during the period and got a 10 per cent return, so that the overall return on that investment brought the overall return down to 13 per cent, would 13 per cent be the cost of capital on that basis? A. I cannot answer that alone and it is unreasonable to expect me to answer that separate from the conclusion in Table I. I have presented these as a piece. They are two bits of evidence which, to my mind, add up to a conclusion as to cost of capital, and I simply cannot reach a conclusion on the basis of one, and one alone, without regard to the other evidence.

Q. So your answer is you are incapable of answering that question? A. I like that verb, yes.

Q. Thank you. Now, I think you said this morning that this 14 per cent—I have forgotten the [1560] exact language, and I don't mean to misquote you and if I do, please correct me, which I am sure you will, but I think you said in substance this morning that this 14 per cent represents the opportunity rate. Didn't you say that in substance this morning? A. I don't think I said that this morning. I think yesterday I used that term in another connection. I think that in explaining why the cost of capital had to be taken into account, it is because the stockholders will not long supply funds which they could invest elsewhere in other opportunities if the rate goes to a point which is below alternative opportunities.

Q. Well, would it be correct to describe this 14 per cent cost of capital rate, which you used in your tabulations, as an opportunity rate? A. No, it would not.

Q. It would not. What is an opportunity rate as understood by economists? A. Well, the term opportunity cost is really a term applied to alternative opportunities. One evaluates in making an investment alternative opportunities, and if the alternative opportunities will yield more, then one chooses the alternative oppor- [1561] tunities, and as a consequence the opportunity cost is essentially that cost at which the investor will choose one or the other.

Q. Now, isn't that what you were doing retrospectively, prospectively in your tabulations, comparing two opportunities supposedly available to Hanover, one to buy and the other to lease? A. You must recall, of course, that I was doing in these tabulations only what the Leidesdorf computations afforded, and I was simply correcting them to make the complete picture of the economic costs. I wasn't making the choices as to whether these were alternative

opportunities that Hanover had. I was taking the Leidesdorf computations as my base.

Mr. Hayes: Would you mind repeating the question, please?

(Question read.)

A. I suppose those terms can be applied.

Q. That's an accurate and fair description, is it not, Doctor? A. Yes, I suppose so.

Q. Let's suppose it is, yes.

Now, applying that test, if Hanover made an investment which returned a 14 per cent, it would [1562] just be breaking even on its cost of capital, wouldn't it? A. That is correct.

Q. And if it made an investment which returned 15 per cent, by your use of the term "cost of capital," you would really be making 4 per cent, wouldn't it? A. It would be making an economically profitable investment.

Q. By 1 per cent? A. By 1 per cent.

Q. And if it made an investment which returned it 13 per cent, it would be suffering an economic loss? A. This is correct.

Q. Not a real loss, this is an economic concept? A. A real loss.

Q. A real loss? A. We are not dealing with theory, we are dealing with reality.

Q. This is money that would be out of Hanover's pocket? A. In the long run it would.

Q. Even though they were making 13 per cent they were losing money? [1563] A. In the long run, it would.

Q. How long is this run, Doctor? A. This depends entirely upon a sequence of actions within an individual company.

Q. Suppose it went on for fifteen years, investing surplus funds at 13 per cent? A. I would suspect over fifteen years the rate of earnings would hence have declined, as a consequence one would have expected that the per share value would have declined, surely the book value per share would logically have declined, and in these terms this is just as real a loss as any one, except for shortsighted business people.

Q. So that by making 13 per cent, assuming they don't pay it all out on dividends, their book value declines each year, does it? A. Relative to earnings.

Q. Even though it is a stronger coropration each year? A. The stronger is your adjective, not mine.

Q. It is a question I am asking you, Doctor. Isn't it stronger financially? A. I wouldn't think it was stronger if the rate of earnings persistently goes down.

[1564] Q. This loss you are talking about is again, to use your phrase, an economic loss, is it not? A. And a real loss.

Q. Is it damage they suffered? A. I don't know what you mean by the term "damage" in this context.

Q. You don't know what I mean by damage? Did you know what the Leidesdorf calculations were offered in this action to prove? A. Yes.

Q. To wit, that it cost Hanover more to lease than it would have cost it to buy.

Mr. Carson: Objected to as improper cross examination, the motive of counsel is no part of the witness's evidence.

The Court: He can answer. He asked him if he knew, and I think he said yes.

Q. Would this failure to make 13 per cent—I will withdraw that.

Now, let me ask you this question, Doctor. Go to your tabulations. You used 14 per cent. I am thinking particularly of Exhibit 52, where you compared the supposed economic costs of leasing with the supposed economic cost of ownership at 14 per cent. [1565] Suppose you had made that tabulation, if you will, at 9 per cent, and that 9 per cent, the economic cost of leasing would be greater than the economic cost of ownership.

Would you say that it would be economically sound then for Hanover to buy the machines rather than to lease them?

The Witness: Would you repeat the question, please?

(Question read.)

A. If the economic cost of leasing, if I follow this long question—if the economic cost of leasing were greater than the economic cost of ownership, then it seems clear that it would not be economic to continue to lease the machines if the alternative were available.

Q. If the alternative to purchase were available it would be economically sound to purchase? A. If I follow this question. I must admit difficulty in following this question.

Q. Maybe this question will help you. Still on the same assumption: Would it mean, following your tabulation, your type of tabulation in Exhibit 52, that if at 9 per cent the economic cost of ownership [1566] would be less than the economic cost of leasing, would that mean that on own-

ership Hanover would be making at least 10 per cent? A. I think the answer is yes, again, if I follow your question.

Q. I think it is, too. Now, suppose, Doctor, that back in 1939 you were retained by the Hanover management to advise it as to whether it should purchase these machines or not, and suppose, further, that you had the gift of foreknowledge and you knew all of the details through 1955 that are set forth in your charts, you would have advised Hanover not to buy, is that correct? A. If I had knowledge of all that happened, yes.

Q. That's right. And suppose the Hanover management said to you, "Sorry, Doctor. We're grateful for your advice, we are not going to accept it because it looks to us that for an investment of around $500,000 we can save rentals and royalties of a million, eight over the next sixteen years, we have the money to make the investment, we are going to improve our profit and loss statement"? Your judgment would be that they were making an unwise decision, would it not? [1567] A. If I then had the foresight that is reflected in these tables, I would hope that they would recognize that they were then making an unwise decision.

Q. Yes, by your standards. A. That is correct.

Q. Whose decision should control in a situation like that, the economic advisor or the management?

Mr. Carson: Objected to as irrelevant and not proper cross examination.

The Court: Yes, sustained.

Q. Isn't it a fact that management finds this concept of cost of capital that you have been telling rather a vague and difficult one, speaking generally? A. Well, the fact that I have been successful in twelve years of consulting suggested it has not been. It is my opinion that it has not been.

Q. That is true with respect to prospective judgment, is it not? A. In prospective decisions it is all the more difficult, and to use your adjective, I think it is the one you use, it is all the more vague.

Fortunately here, and as I said yesterday, this is one of the advantages, one of the few advantages [1567a] that we have, and here we look back retrospectively and we see many of the vague aspects smoothed out by the elapse of time.

[1568] The Court: Doctor, may I go back just a few questions.

Mr. Hayes asked you the question that if you had known all these facts from 1939 up until now and that for an investment of $500,000 Hanover could have purchased this machinery, and I think he asked you the question whether you would have advised Hanover to make the purchase and your answer was no. May I ask one further question. If Hanover gave you the choice or said to you, "We want to do one of two things: buy this machinery at $500,000 or continue our capital in the way we have been using it," which is not really using it, I guess, what would have been your advice to them?

The Witness: I would have said on the basis of these figures and at the cost of capital that you are better advised to continue the leasing but I would have assuredly advised them to try to find some way to pay out that capital so that they do not have it, or to find uses for it. I don't think I would have advised them to put it to a use which would seem to be a less economic one than the one that they then had as an alternative, the leasing. The solu-

tion for Hanover, in my opinion, in 1939 and 1940 was not to put unneeded [1569] capital to work at an uneconomic rate but to get rid of unneeded capital.

The Court: All right.

By Mr. Hayes:

Q. Suppose there were no other better opportunities available to it than the purchase of the machinery? A. If it had made a bad mistake in accumulating capital in this business that was not needed and was not paying it out, so that it wasn't bearing a burden that it did not economically need in this business, then you always have the advantage of paying it out to your stockholders and relieving yourself for the future of the burden of carrying unneeded resources.

Q. That disturbs me a little, Doctor. What would they do then a few years later if they needed that capital for some opportunity that did come along; issue some more stock to the same stockholders? A. That is precisely what they did do.

Q. No, it isn't. I am sorry to differ with you. A. In Table I it is suggested that they did sell additional stock in successive years when additional capital was needed.

Q. Do you see any indication on Table I or in any of your tabulations where Hanover first paid out dividends [1570] to its stockholders and then sold stock back to the same stockholders because of a later opportunity they didn't see at the time they paid the dividends? A. Table I does not deal with that problem and I don't think your question did.

Q. That was what your answer was. A. That was not my answer.

Q. I think the record will show what your answer was. So your solution would be if they couldn't get 14% they should declare dividends? A. My answer was that they should not. My answer to the Court was that it is not a wise business decision to simply, because you have excess cash, use it in an uneconomic way.

Q. That is what, in your opinion, is an uneconomic way, using 14%? A. I can only venture my opinion.

Q. Right. And if you are wrong on the 14% and it should be 6% that changes the whole picture? A. And if it should be 22% it would change it substantially.

Q. If it were 6% it would also change it, would it not? A. Correct.

[1571] Q. You would concede, would you not, that management has a prerogative in determining what should be paid out in dividends and what should be kept in the company? A. They certainly have that prerogative.

Q. You would not disagree with—by the way, you are the one who mentioned the Donaldson book yesterday? A. Yes.

Q. You would not disagree with the statement he makes on page 61, "It is really not surprising that management which has had a lifelong identification with a particular business finds the opportunity concept rather vague and unreal except as specific alternative investment opportunities actually exist for their consideration"? A. I have not thought about that statement, so I really don't have any opinion. I don't have, at first blush, any reason to object to it.

Q. It sounds like ordinary common sense, doesn't it, Doctor? A. Will you tell me where it is?

Q. Page 61. It is the part that I have marked with the pencil in the margin on page 61. A. I see. I would hardly

think it is applicable [1572] in this case. The statement says, "It is really not surprising that management which has had a lifelong identification with a particular business finds the opportunity concept rather vague."

Now you have been picturing quite precisely what the alternative opportunities were here and they were alternatives with which the management of this company had had a lifelong identification, leasing shoe machinery versus buying. If the assumptions in this proceeding are to hold, if the machinery were available for sale in 1939, this lifelong identification with the industry was in an industry in which these alternatives were not unknown to them then.

Q. The alternative of—— A. Leasing and buying.

Q. The alternative of buying was unknown to them, was it not? A. We are making, and the Leidesdorf computations make, the very artificial assumption that they were available for sale in 1939 and if they were available for sale and if the assumption is valid in one respect it is valid in this respect.

Q. So that is your answer? A. That is my answer.

[1573] Q. Thank you, Doctor. Do I understand your theory in substance to be this: that if an enterprise has an opportunity offered to it—its cost of capital, we will assume, is 14%—whereby it can make 20%, and another opportunity is offered to it whereby it can make 10%, and for reasons that management deems best it elects the 10%, that there is a real loss sustained by the business? A. I think I made clear that in the long run there is a loss sustained by the business that is reflected in a lower rate of earnings on stockholders' equity and is reflected in a lower per-share value relative to earnings.

Q. And that is your approach here? A. Yes.

Q. And you come out with a conclusion, on Exhibit 52, and I want to know if this is what you mean by Exhibit 52,

when you speak of excess of costs of ownership over costs of leasing of $949,000, that Hanover was not damaged in this case? A. I have developed this table to present just what I mean, that on the assumptions first stated in the Leidesdorf computations, if these were additional factors that any going enterprise would have to take into [1574] account, that then, between these alternatives of leasing and of owning, the cost of ownership would exceed the cost of leasing.

Q. And therefore there is no damage to Hanover as a consequence of its inability to act to buy the machines? A. I don't presume to know all the legal implications of the term "damage" as to be willing to use it. I have said precisely what the table means and I won't say anything more.

Q. You are not going to say that they made a profit, either, of $949,000? A. I hope I have made clear what is meant.

Q. So that these tabulations, in your mind at least, do not demonstrate that Hanover did not suffer damage?

Mr. Carson: Objected to as already answered.

The Court: I am going to sustain the objection. I think that is what this lawsuit is: whether it suffered damage, and I do believe that the doctor is correct, that involves many more things than these tables.

Mr. Hayes: I submit this is a perfectly proper question, your Honor.

The Court: As to whether Hanover suffered [1575] damages?

Mr. Hayes: Whether his tabulations in his mind indicated that Hanover suffered no damage, if that is what he is seeking to prove by these tabulations.

The Court: I think your question was based on the entire case and not on the tables.

Mr. Carson: That is irrelevant and the tabulation speaks for itself.

The Court: I sustain the objection. If you want to reframe your question, you may.

Mr. Hayes: I would like to press it, your Honor, and I don't want to seem stubborn——

The Court: No. Try it again.

Q. Were your tabulations prepared for the purpose and with the intent of attempting to demonstrate that Hanover sustained no damage because of its inability to lease the twenty machines which you considered in your tabulation?

Mr. Carson: The same objection.

The Court: Yes. Sustained. I think that is an improper question. I think it is quite clear that he has taken these Leidesdorf reports which have certain assumptions and maybe he would not make those assumptions and he has corrected them where he thought they should be [1576] corrected and he has arrived at a dollar result, which is obvious, as I see it.

Q. Look, if you will, please, Doctor, at Exhibit 48, your Table III. Do you have it before you, Doctor? A. I do.

Q. The figure at the extreme right, under the Total column, of two million, two hundred forty-seven thousand-odd dollars you described yesterday, if my notes are correct, as the true leasing cost; is that correct? A. Well, I would rather you use the words that the table suggests: "The future worth of the net capital employed in leasing."

Q. Do you remember testifying that that meant that was the true leasing cost? A. I don't remember it exactly in those terms and I don't doubt it and I don't wish to correct it if I did.

Q. You don't wish to correct it? A. That's right.

Q. My note may be in error but that is what it shows. Actually what you did to arrive at that figure was to take the leasing payments each year and from which you deducted what you call the relevant income [1577] tax rate to arrive at what you called capital recovered through tax savings, leaving a net capital employed in leasing, and then you applied the future worth, the rate you obtained from one of your other tabulations—I think it was Table V, Exhibit D50—to that remainder of $19,000, and I am looking at 1939. Isn't that right? A. That's right.

Q. So that you get as a future worth figure of a $25,000 investment in 1939 a figure of $179,000 in 1939; is that correct? A. That's correct.

Q. That is only because you used 14%, isn't it? A different percentage will give you a different figure at the bottom? A. A different percentage would give me a different figure.

Q. Now you are not suggesting by this, are you, that the cost to Hanover in 1939 of paying out $25,000 in leasing charges was $179,000? A. I am suggesting that in considering the two alternative opportunities that one has to take into account the value of that capital over a period of time and here I have applied, for comparison's sake particularly the same future worth factor as in the table on cost of [1578] ownership.

Mr. Hayes: May I have the question again, please.

(Question read.)

Mr. Carson: I object. The answer is responsive.

The Court: Read the answer, please.

(Answer read.)

Mr. Hayes: I submit that is not responsive.

The Court: You may proceed, if you want, to get a better answer.

Mr. Hayes: I don't know if it will be better or not; I just wanted more responsive.

Q. I am talking just about Exhibit 48, Doctor, not about the cost-of-ownership table, and you show at the bottom a future worth of net capital of $179,000 for the year 1939 which you arrived at, as you described, by applying an interest factor for sixteen years to an actual disbursement of $25,500. All that Hanover paid out in 1939 was $25,500, wasn't it? A. Surely.

Q. Are you suggesting that Hanover incurred a real cost of $179,000 by paying out $25,000? A. In the context of this statement and this [1579] table, I am so suggesting.

Q. This $179,000 figure is not a figure that Hanover could have deducted in the year 1939 from its income tax return, is it? A. It is not, but that is not a full picture of the purpose of that statement, as I suspect you realize.

Q. It is not an expense, this $179,000 figure, using the word "expense" in the strict accounting sense? A. The expense, in a strict accounting sense, has no relevance to this table.

Q. Whether it does or doesn't, I want to know if it is an expense in the strict accounting sense? A. It is not.

Q. And the same is true of that bottom figure in each of the years? A. That's correct.

Q. And it is only when you add all of these future values together by applying this percentage based on a 14% so-called cost of ownership or cost of capital that you arrive at this true leasing cost of $2,247,000; is that correct? A. That's correct.

Q. So that although the total payments by Hanover for leasing costs were $1,963,000, according to you [1580] the cost to Hanover was $2,247,000? A. The 1955 worth of the dollars that were tied up over this period of time was $2,247,000.

Q. I thought that was what you meant by the schedule, Doctor. The fact of the matter is that that future worth figure is a pure artifact, is it not? A. Well, if I know what your term implies, I would say clearly not.

Q. Isn't it something that was made by just taking a percentage and applying it to a figure? A. It was made by taking a percentage and applying it to a figure by taking the relevant percentage and applying it in the relevant place to aid in the alternative choice of opportunities.

[1581] Q. Let's take a look at Exhibit 51, which is your Table VI, the economic cost of ownership. Look, if you will, in 1939, at the figures under there. If my recollection serves me correctly, you described Table VI as showing the true economic cost and the last item under 1939, $3,200,000, you described as the worth of capital employed over sixteen years and that Hanover employed that capital.

Am I correct in my recollection of your testimony? A. Under the assumption that I was bound by the Leidesdorf computations.

Q. I am talking about the assumption that you are making as to cost of capital. Leidesdorf didn't bind you as to that figure at all, did it? A. No.

Q. So the Leidesdorf report had nothing to do with that figure? A. It assuredly did not.

Q. This is Corson, is it not? A. That's right.

Q. We couldn't possibly have checked all your calculations, Doctor, but it seemed to us that in order to arrive at that 1939 figure of $3,266,000 that [1582] you applied the 17-year rate to what you called the net capital employed of $352,000. A. I think that is right.

Q. Was it correct to employ the seventeen years? A. This is the sixteenth full year, is it not, and I think it is correct.

Q. The investment was made on July 1st, under the asumptions? A. July 1, 1939.

Q. And the cutoff date was when? A. September 21, 1955.

Q. That would be sixteen years and two months, would it not? A. That is correct.

Q. And the 17-year rate is the one you used, is it not? A. For that particular one year, yes.

Q. And we made a rough calculation last night and came out to a difference of about $300,000 on that figure alone. Would you agree that that would be about right? A. I have not made that calculation. I would still think that is the revelant rate to apply. If [1583] you took an earlier year, it would be a lower figure.

Q. You still think you should apply the 17-year rate for sixteen years and two months? A. Yes. We are talking about the length of time that that capital was tied up.

Q. Which was sixteen years and two months? A. That is correct.

Q. And you apply seventeen years? A. That is correct.

Q. Now, it is that figure at the bottom of '39 which

is the largest single element in your so-called economic cost of ownership, is it not? A. That is correct. But as I pointed out on yesterday, that figure is reduced and increased as subsequent years go on.

Q. That's correct. I am talking about the eventual figure at the end, the $3,197,000—that is the figure you come out with as the economic cost of ownership overall, is it not? A. That is correct.

Q. And you couldn't possibly get a figure like that unless you took the so-called ownership costs, that is, the cost of the machinery for those twenty types, less the depreciation, or the saving on depre- [1584] ciation, of $352,000, and you arrive, from a $352,000 actual investment at a cost to Hanover in that year of $3,266,000, is that corerct? A. I have no idea what that sentence is. I will have to ask to have it read.

Q. Let me restate it. In order to arrive at the $3,266,000 figure at the bottom of '39, all you did was to take what you called the net investment for that year of $352,000 and multiply it by 14 per cent for seventeen years, compounded, is that correct? A. That's correct.

Q. Would you describe that as an artifact? A. Again I can only say I don't know what your word means, but I doubt it.

Q. The actual money that went out from Hanover under the assumptions in Leidesdorf was only $366,000, wasn't it? A. That is an utterly unreal figure.

Q. I am talking about the money that was disbursed out of the bank account.

Mr. Carson: That was disbursed?

Mr. Hayes: Under the assumptions, I say.

Q. Are you suggesting that Hanover would have been paying out in cash $3,266,000? [1585] A. It paid out at least $1,681,000 for new machinery acquired. It had that money tied up over an extended period of time and if the recognition that it was tied up over an extended period of time is an artifact, then this is in fact an artifact.

Q. Let me try again, Doctor. Is the figure at the bottom of the 1939 column supposed to show a cash disbursement by Hanover in 1939 of that amount? A. The table makes it perfectly clear what it is supposed to show. It is supposed to show the future worth of the net capital employed. The net capital employed is made perfectly clear on this table as the actual expenditure in that year.

Q. The actual expenditure was not the $3,266,000, was it? A. No.

Q. I noticed you used a 10-year straight line method of depreciation. Why? A. Well, in consideration of what would be the relevant rate of depreciation, it seemed to me that for machinery of this type this was probably the appropriate one. I suppose one could find a rate of maybe as low as 6 per cent or as high as 12 per cent, but it is difficult to say what is the exact rate that [1586] would be applied by Internal Revenue and this, on the basis of such inquiries as I made, seemed to me to be an appropriate rate.

Q. Did you check the use of the 10-year straight line depreciation rate with United Shoe Machinery Corporation? A. To the best of my knowledge, I did not, but I did call people in the Internal Revenue Service to inquire as to the relevant rate.

Q. Did you find it difficult to find a relevant rate? A. Without being able to describe all the machinery exactly, I couldn't say.

Q. I show you Bulletin F. Are you acquainted with that? A. No, I am not.

Q. That is depreciation rates, Federal Tax Reporter, and I read to you, and you better follow me so that there is no question that I read it accurately——

> "The principal leather manufacturing industry is the making of shoes and the average composite life of shoemaking machinery is approximately fifteen years."

[1587] Did I read it accurately? A. You read it accurately. I don't know whether that is the applicable factor to guide me in this decision.

Q. Can you refer me to any other authority which makes the ten years the applicable life? A. No, I cannot.

Q. You cannot. Now, as a consequence of your using ten years, let's go over to Exhibit D-51 to 1949 where there were disposals in that year and in every year except '50 thereafter and you showed—you took the disposal value, and each year the disposal value was pure salvage, wasn't it, because there had been a complete depreciation? A. There were in these latter years.

Q. That's right. And you applied to that a 25 per cent capital gains tax, right? A. That is correct.

Q. And then you arrived at an after tax disposal recovery? A. That is correct.

Q. And you deducted the disposal recovery from the ownership cost to arrive at a figure; correct? A. That is correct.

[1588] Q. Now, if you use a 15 per cent rate, would there have been any salvage—would there have been any capital gains tax in the year 1949? A. Do you really mean, Mr. Hayes, a 15 per cent rate?

Q. Did I say 15? I am sorry; a 15-year life, Doctor. I misspoke. If you used a 15-year life, would there have been any capital gain in 1949? A. In the year 1949, I don't know without looking, but in the year 1949 I presume not.

Q. And the same would be true of each of the other years because you took a 10-year life, wouldn't it, necessarily? A. Each of the other years?

Q. Yes. A. Do you really mean that?

Q. Yes, I do. A. In the year 1955, in which, according to the assumptions most of the disposals were made, a 15-year life would have run out on a lot of this machinery, and, as a consequence, without again having had the opportunity to check this back, that particular year in which most of the disposals were made, would still have had the same result.

[1589] Q. That is because of the particular lives that were used in Exhibit 41, isn't it? A. No, I don't think it is.

Q. If you had used one of the tabulations based on the 15-year life, they would all have expired in 1954, would they not? A. Yes, that might be, the Hanover machines——

Q. Yes, because of the difference in lives that happens to be true, isn't it? A. Yes, that could be.

Q. Yes.

* * *

[1590] *Redirect Examination by Mr. Carson*:

Q. Dr. Corson, in identifying Plaintiff's Exhibit 41 yesterday, at Page 1351, I think I erroneously used the date March 10, 1962, as the date of the letter of transmittal because I was referring to an older draft of the same document. A. I noticed that date.

Q. You understood that I was referring to the exhibit you have in front of you which does carry the covering letter of April 19, did you not, Dr. Corson?

* * *

[1591] Q. In questioning you with reference to Plaintiff's Exhibit 41, I called your attention, if you will remember, to the other four Leidesdorf tabulations which have been marked Plaintiff's 37, 42, 43 and 46, and asked you certain questions about them. A. I recall.

Q. Is it the fact that in your preparation for your testimony and in your testimony here you have taken into consideration all those five Leidesdorf exhibits? A. I have.

[1592] Q. Now, in the exhibits or tabulations prepared by you and offered by the defendant, marked D-48 and so on, specific reference is made to plaintiff's 41, which embraces 20 major machine types, do you recall? A. I do.

Q. Did you prepare similar tabulations with respect to the other two exhibits of plaintiff dealing with the same 20 major machine types, namely, 37 and 42? A. Did I prepare tabulations, similar tabulations?

Q. Or calculations, yes. A. In the preparation of this material, I explored each of these alternatives sufficiently to give basis for the statement I have made that they would not alter my conclusions with respect to these factors that I have added, but I did not complete tabulations of the same sort with respect to each of the other Leidesdorf tabulations.

Q. With respect to Nos. 37 and 42, do I correctly understand that your conclusions overall, are substantially the same as with respect to 41 which also deals with the 20 machine types? [1593] A. They are indeed.

Q. Now let me address your attention to the two others, Nos. 43 and 46, which deal with 38 additional machine types involving smaller revenues, smaller amounts, and they

were numbered by the plaintiff or by Leidesdorf Nos. 21 to 58, inclusive.

What consideration did you give to these in connection with your conclusions as to No. 41? A. I gave it the same kind of consideration. They came in late, and as a consequence I had less time and my tabulations were developed in considerable part before I saw those, but what I did was to pick out of those those machines that had the greatest usage or the greatest rentals and attempt to determine, particularly in comparision with the rentals in the first 20 machines, whether they could be expected to have any different result.

I am satisfied that there would be no different result. The same kind of analysis would yield the same kind of result if applied to those three machines.

Q. And the kind of result that you would reach with respect to those 38 machines is that on the application of the three factors you talked about, [1594] the economic cost of ownership would be greater than the economic cost of leasing? A. That is correct.

Q. Did you determine by just how much? A. I did not.

* * * *

[1614] Q. My next question, Dr. Corson, is addressed to some testimony you gave in answer to Mr. Hayes about an assumed interest rate for borrowings in connection with the figure you were given for the cost of equity capital.

You expressed some views in answer to questions of Mr. Hayes as to the cost of capital involved in the borrowing when related to the cost of capital, the equity capital.

Do you remember the subject I am talking about? A. Yes.

Q Do you have any economic authority for the answer you then gave? A. The point of view I then stated—the

opinion I then stated, it seems to me, is borne out by a very brief statement in one of the books I referred to on yesterday, page 136 of the book entitled "The Management of Corporate Capital," edited by Ezra Solomon in this particular section or chapter—

> Mr. Hayes: What page was that Doctor?
> The Witness: Page 136.

A. (Continuing) This particular chapter is "Measuring a Company's Cost of Capital," and it was [1615] written by the editor of the volume, Dr. Solomon, and considers several approaches to the consideration of the cost of capital, and the one on page 136 that he designates "Approach A" he discusses in these terms:

> "One approach is to take the supply of equity funds as given"—if I may interpolate, that would be to take, in this instance, the capital already invested in Hanover—"and to assume that all increments of financing over and above this are derived from borrowing."

Several of Mr. Hayes' questions assumed that you would borrow over and above the capital already employed.

> "The relevant cost of new capital is simply the net (after-tax rate) payable on an increment of borrowed funds. Proposals which promise a net rate of return greater than this cost should be accepted. This approach suffers from a number of serious defects, and it should be rejected. The most important defect is that it fails to recognize that debt funds generally cannot be used without committing some proportion of equity funds, and that these

equity funds also [1616] involve a 'cost' because alternative uses of such funds exist, for example, dividend payments. Because it ignores the cost of equity funds, Approach A provides a wrong criterion for judging the acceptability of investment proposals. Whenever the next cost of equity funds is higher than the net cost of debt funds (and this is the usual case) the use of this approach will lead to the acceptance of proposals that should probably be rejected. This inherent error is easily demonstrated by means of a simple arithmetic example."

Then there is an arithmetic example, but I don't think it is necessary to read it——

Q. But you have it available in the book if requested? A. I do.

Q. Let me draw your attention a minute to the instance that was given to you of a secondary issue of Hanover Shoe in April of 1956. Do you remember being questioned about that by Mr. Hayes? A. I do.

Q. Did you or did you not take that issue and the price thereon in consideration in arriving at your estimate of the cost of capital at Hanover in [1617] that period? A. I did not.

Q. Why not? A. I studied that but I did not take it into account for the reason that it was beyond, as I hope I made clear in response to Mr. Hayes' questions. The period that was here under review and it did not seem to me, as a consequence, relevant. It seemed it would subject me to the same kind of criticism that Mr. Hayes implied in his questions that suggested I should have taken into account only the rate of cost of capital for the year 1940.

It did not seem to me relevant to the period under review.

Q. What is the proper practice and procedure in dealing with the proceeds to the issues of an issue of stock on the market in connection with appraisal of the cost of capital? That is, should one take the net proceeds after underwriting costs and the cost of flotation or the gross proceeds? A. I think they should take the net proceeds.

Q. On the balance sheet, in what form is capital ordinarily carried? A. Capital is normally carried on the balance [1618] sheet as a liability, a liability of the corporation to the stockholders. On the one side you customarily have on the balance sheet the assets and on the other side the liabilities and the capital is customarily included with liabilities as a liability to stockholders.

Q. You were asked a number of questions about various parts of your testimony which involved the use of the words "economic concepts," such and such being economic concept, and sometimes questions compared economic concepts with accounting concepts.

Would you tell the Court how, if at all, the economic consequences of business decisions judged by economic concepts are carried into a company's balance sheet? A. I said in answer to some of Mr. Hayes' questions that in the long run they inevitably are reflected in the balance sheet and the profit and loss statement.

To make that specific, in this instance I would expect that the kind of decision here involved related to the use of capital is reflected in A, perhaps if debt is used—if debt is used, I should eliminate that, perhaps—it is reflected [1619] in the actual out of pocket expenditures for the interest on that debt.

In the cost of common stock, capital is applied by the sale of common stock, or in capital supplied by the retention of earnings, it is not as apparent. That was the term I used yesterday morning in describing this, but it is reflected over a period of time in the rate of earnings in relation to stockholder equity.

The relation of the actual earnings shown on the profit and loss statement related to the stockholders' equity, that is, the total assets less total liabilities to other than stockholders—it is reflected in those two figures, one compared with the other, one from the profit and loss statement and one from the balance sheet, and in the long run it is reflected in the surplus account and, hence, in the per share value, the book value, of the stock.

In this proceeding it is interesting to note, as Mr. Hayes helpfully brought out, that there was an agreement, if I understood him correctly, that if someone sold their shares, they were to sell them at a book value. It would be precisely related at that time in that figure which would be taken from [1620] the balance sheet.

Q. You were asked some questions in connection with future worth, to bring out that in your calculation an application of the future worth figure on Exhibit D-51, dealing with the economic cost of ownership—you used a figure based on a period of seventeen years. Do you remember that? A. That is correct.

Q. Was the same figure used by you in the same respective years of the period in calculating future worth of capital employed in connection with the economic cost of leasing? A. Precisely the same factor was used in each instance.

Q. It was the same 17-year period that was the basis in each instance? A. It was the same 17-year period.

Q. You were asked questions based on your 10-year straight line depreciation reflected on Exhibit D-51. Do you remember that? A. Yes.

Q. You began to make some answer concerning the practice of the Internal Revenue Service. Did you complete your answer on that? You made some [1621] inquiry of the Internal Revenue Service? A. I made a telephone inquiry at the time to find out what was the appropriate rate, and perhaps it was my inadequacy in describing the machinery, but I was told that an appropriate rate would be 10 per cent.

My answer to Mr. Hayes' point that a 15-year life was simply to imply that I am not sure that stipulates the rate that would have been used, but I think it is relevant to point out that had I used the rate that Mr. Hayes suggests I should have, by his questions, I would have in this way increased the future worth of the net capital employed. I would have increased the net capital employed and would have come out with a result that is greater than it is presently stated in D-51.

Q. That is, by depreciating less in the year by year, for fifteen years, you would produce a greater balance, subject to the future worth factor? A. That is precisely what I mean.

* * *

[1622] *Recross examination by Mr. Hayes:*

Q. You testified on redirect examination, Dr. Corson, that with respect to the secondary issue which took place in 1956 that the proper—you suggested that the proper way of determining would be on the net amount received by the corporation, is that correct?

* * *

Q. I did a little arithmetic, that if you take the $25 price which the new shareholders pay, it would come out to an 8.4 per cent return, the $2.09, and if you take the $23.25 which the corporation received, it would come out to just under 9 per cent.

I take it you don't dispute these figures? A. I have no reason to dispute them.

Q. In either event, it would be substantially below the 14 per cent. Did I understand you to say that capital stock is carried on the liability side [1623] of the balance sheet and is a liability to stockholders? A. A liability of the corporation to its stockholders was what I said.

Q. In what sense do you use the word "liability"? Not in the same sense that you use "liability" with respect to a creditor on the accounts payable, is it? A. No. Here is an illustration of precisely what I am saying: This is the balance sheet of Hanover Shoe, Inc., for December 31, 1940, and at the bottom of the page is the term "liabilities." Under that is "current liabilities" and "capital."

Then there is a statement "total liability is $4,684,000," which includes the two.

[1624] Q. That's the internal statement that was prepared. Now, what is the usual heading that is used in financial statements? You are acquainted with them, aren't you, Doctor? A. I think so.

Q. On the left you have the assets. And on the right, the usual heading is what? A. I think this is not unusual.

Q. What is the usual heading, do you know? A. I wouldn't supply any other. I think this is usual.

Q. Do you ever see the words "liabilities and capital"? A. This is not uncommon.

Q. It is very common, as a matter of fact, is it not? A. It is very common.

Extract from Deposition of Raymond F. Purtell

Q. That's right. And, as a matter of fact, while debts are liabilities because they can be sued upon, capital stock is not in that sense a liability, is it? A. Not in a sense, but I made clear in my statement that——

Q. I wasn't sure whether it was or not. I [1625] just wanted to be sure that the record was correct.

Mr. Hayes: No further questions.

* * *

[1716] Mr. Carson: Defendant offers the deposition of Raymond F. Purtell taken first in New York and adjourned to Beloit, Wisconsin, June 8 and August 15, 1961.

* * *

Page 3, third question:

"Q. What is your present occupation, please? A. I am vice-president of manufacturing of Freeman Shoe Corporation, Beloit, Wisconsin.

"Q. Were you at any time in the employ of plaintiff, The Hanover Shoe, Inc.? A. Yes, I was.

"Q. In what period, please? A. I am not sure exactly of the month. I think it was November 1949-1950, through January 1, 1955-1956. [1717] I am not sure of the date."

* * *

[1722] "Q. At the Emmitsburg plant, what was the line of machinery in place when you first saw it? A. I heard say that the machinery at the Emmitsburg factory was primarily the same machines that were in the Hanover factory, with the exception, perhaps, that—since you raise the question about the cutting department, I believe all the clickers in [1723] the Emmitsburg factory were all United clickers.

"From that point on it was the same machinery that was in use in Hanover.

Extract from Deposition of Raymond F. Purtell

"Q. When production ceased at the Emmitsburg plant, what was done with the machinery there? Do you remember it? In other words, was it returned to United or to the other lessors, if any, or was it transferred to the Hanover plant? A. To the best of my knowledge, we re-evaluated the machinery that was in Hanover on a lease basis or the machinery other than United in other departments and we consolidated the machinery from the two plants and returned the surplus machines.

"Q. To United in the case of its machines and to other lessors if there were other rented machines? A. If there were other machines, then they were returned.

• • • • •

[1725] "Q. After you became superintendent, to whom did you report in the regular line of your duty? A. To Mr. Lawrence Sheppard.

"Q. Anybody else? A. No, not directly.

"Q. Do you recollect having become a member of the board of directors of the Hanover Shoe, Inc., in 1952? A. I could not tell you the actual time but I became a member of the board of directors at some time.

"Q. And after you became a member, the date being established by an exhibit in this case, Defendant's Exhibit 61 for identification, did you regularly attend directors' meetings? A. I did.

"Q. Were you at any time elected an officer of the company? [1726] A. I was.

"Q. What office? A. The office of vice-president.

• • • • •

[1727] "Q. Would you search your memory, Mr. Purtell, and tell us whether, at the time you entered the employ of Hanover, around the beginning of your employment as assistant superintendent, you were informed by anybody

[1855] LEWIS B. WALKER, called as a witness on behalf of the defendant, being duly sworn, testifies as follows:

Direct Examination by Mr. Carson:

Q. Will you give us your business and residence address, Mr. Walker, please? A. Business address is 140 Federal Street, Boston, Massachusetts; my residence address is Marblehead, Massacusetts.

Q. Are you now in the employ of defendant, United Shoe? A. Yes, sir.

[1856] Q. And you began your employment in the year 1911, did you? A. Yes, sir.

Q. After graduating from Amherst College? A. Yes, sir.

Q. Now, would you sketch very briefly with the dates the nature of your connection with United from 1911? A. Well, from 1911 to 1920, I was a trainee in various branch offices which included Lynn, Marlborough, Milwaukee, New York and Boston.

From 1920 to 1935, I was assistant district manager of our St. Louis territory.

From 1935 to 1940, I was district manager of our Milwaukee territory.

In 1940 until the present time, I have been in the Boston office as a member of the management firm since 1958 as a consultant to the law department.

Q. Did the status of your employment change in the year 1958? A. Yes.

Q. In what way? A. I relinquished my management duties, resigned as a member of the board of directors and became the [1857] consultant to the law department during the pending litigation.

Q. By the "pending litigation" you referred not only to the Hanover suit but to the series of private antitrust suits? A. Yes, sir.

Q. When did you first become a member of the board of directors? A. In 1954.

* * * * *

Q. Do you recollect discussions with Mr. Sheppard in this period, and, if so, I will ask you to fix the date, concerning the leasing policy of United? A. Well, I remember very distinctly Mr. Sheppard, I think on several occasions, speaking about his encounter with Colonel King on the leases in the early stage of his connection with the Hanover Shoe Company. Mr. Sheppard had very strong feelings on that, and told that incident several times.

* * * * *

[1867] Q. . . . Do you recollect anything else being said by Mr. Sheppard as to United's leasing policy in the conversations you had with him in 1940 to 1955? A. Well, I think at one time he was a little confused and a little unhappy about having to get a license from the BB Chemical Company on a patent that they held and under which he had to be licensed before we could ship the machine that used that license.

Q. Well, I will now ask you, Mr. Walker, you said he was confused and unhappy, and I am asking you what he said in words or substance. A. Well, I can't quote the exact words, he didn't understand it, and he didn't know why he had to do business with the BB Chemical Company to get a United machine.

Q. Is what you have testified the whole of what you remember of Mr. Sheppard having said in the period as to

United leasing policy? A. Well, I was present with Mr. Kiendl and Mr. [1868] Ward during that visit.

Q. You are referring to the visit of June, 1950? A. Yes, sir.

Q. And you heard that conversation? A. Yes, sir.

Q. Now, apart from that was there anything else you remember Mr. Sheppard said about the United leasing policy or practices? A. No, I don't recall anything specific.

* * * * *

Q. Now, in the course of dealing with its lessees in 1940 to 1955, did United render any services other than repairing the machines? A. Yes, we had Boston office technicians who [1877] tried to give service beyond what the branch office personnel could give; we also had a planning department, we had what was known as a Shoe X department, which really consisted of expert shoemakers, most of them had been superintendents who gave a quality service.

Q. Were any of these services rendered to Hanover by United in 1940 to 1955? A. Yes, they were.

Q. Will you tell the Court which ones? A. I think all of them.

Q. Can you specify, give us any detail? A. No; I know that we did considerable planning department and layout work on fitting rooms. I know that we had certain people from the Shoe X department down there on general shoe making, and I know that we had many of the Boston office technicians down there helping on problems where either the branch office or the Hanover people wanted help beyond what they were getting from the local office.

* * * * *

Q. How did these services come to your knowledge; did you have anything to do with them, is my question? A. Well, the operating department and their [1877a] personnel reported to me and the Shoe X department reported to me and, as in any organization, the people in charge of these departments wanted to keep me as a member of the management posted on what they were doing.

[1878] Q. Will you describe to the Court what the Right of Deduction Fund was? A. At the time the Form A leases came into existence, as a result of conferences the corporation agreed to set up a fund at that time amounting to 2 per cent out of the rentals and royalties paid on the new Form A leases to be used against the fixed deferred payment listed in the Form A which we began to sign them.

Q. How was that fund operated in the period 1940 to 1955 in so far as it came to your attention? A. By that time the fund had been increased to a 4 per cent figure and that was set up and was used not—could be used not only to apply against the deferred license fees stated in the leases but it could also be used to wipe out the four largest payments for use less than minimum on any machines on which we made any charges.

Q. You mean in each year the four months in which the payments were used would be the biggest? A. Yes, the most favorable to the lessee.

Q. You spoke of 4 per cent of rents and royalties—or was it just royalties? A. No, rentals and royalties, charged under the [1879] Form A leases.

Q. This 4 per cent was a deduction, was it, or a credit, rather, with respect to the payments of each lessee? A. I am not sure I understand exactly what you mean.

Q. Put the thing your own way. On what was the 4 per cent computed? A. If the charges were $100 in any given month, $4 would be set up on the books in that fund.

Q. My question was, was this done on a wholesale basis or lessee by lessee? A. Lessee by lessee.

Q. So that there was a Right of Deduction Fund credit for Hanover on the books of United? A. Yes, sir.

* * * * *

Lawrence B. Sheppard—Cross Examination:

[136] Q. That was about the year you became president of the National Shoe Manufacturers Association? A. I became president of the National Shoe Manufacturers Association I believe in 1946. Perhaps—I think our annual election of officers in that Association is around November, I believe.

Q. You continued as president I think you told counsel until 1949? A. It was a four-year term.

* * * * *

[146] Q. Can you look at the lefthand side of the four pages of this document and tell the Court whether you now remember having known that one or more machines of each type of United were ever leased by your company before 1955? A. One or more of each type?

Q. Yes, sir. A. I can't say that from memory.

Q. You can't say it? A. No, not from memory, I can't.

Q. You can't remember the machine types? A. Of course I can't. There must be—I don't know how many of these optional machines there were. There were great quantities of them, numerically, and they were small, inconsequential machines that [147] naturally one would not give

too much thought and effort to. I think the optional machines amounted to only 3 per cent of our royalty and rental bill. Now, I will be glad to study this and try to anwser it, but from this sheet of paper, I can't answer it as to each group here.

* * * * *

[205] Q. Were you familiar with a Moenus Company? A. A Moenus,M-o-e-n-u-s, or something like that, yes.

Q. Did you make a fairly large number of machine equipment adaptable to your use? A. No, sir, not adaptable to our requirements.

Q. Did they make any adaptable to your requirements? A. We tried a couple of Moenus, different types.

Q. No. First my question was, did they make any adaptable to your requirements? Can you answer that? A. I am not sure. I know that we tried some. To the best of my recollection we returned them all as unsatisfactory.

* * * * *

[207] Q. Did you ever hear of the Dania, D-a-n-i-a, Company in Denmark, a manufacturer of shoe machinery? [208] A. Yes, I have.

Q. Did they in your judgment and opinion in the period manufacture any shoe machines adaptable to the use of your company? A. I believe I might be, confused with Pedersen in my answer.

Q. They are different companies? A. That is what I was searching for. If they are different companies—it runs in my mind we tried a Dania machine or two, I can't tell you what they are, and I am quite sure we didn't keep any of them. We returned them.

Q. Wasn't the Jupiter stitcher manufactured by Pedersen or Peterson? A. Pedersen.

Q. Did you try that? A. Yes, sir.

Q. Did you keep it or reject it? A. We rejected it at that time. Since then—and quite recently—they have revised, revamped the machine, rebuilt the machine. We have one, and bought it, and it is very satisfactory. It is the first one that has done competent, comparable stitching to the Goodyear stitcher.

* * * * *

[213] Q. Now, the friends which were on the committee or on the trip to whom you referred included Allan Cadwell, who later joined your company? A. That's right.

Q. And also included, besides others you [214] have named, Henry W. Boyd? A. Yes, sir.

Q. Who was then chairman or president of Genesco? A. He was president of General Shoe at that time; since Genesco.

Q. Later called Genesco? A. Yes, sir.

Q. One of your competitors in the distribution of men's welt shoes? A. Competitors are right friendly in the men's shoe industry.

Q. Sir? A. Competitors are frequently right friendly in the shoe industry.

Q. I am not questioning your friendship. You were very close? A. Yes. Mr. Cadwell too, and Mr. Byron Gray also.

Q. You discussed with Mr. Boyd all he knew, I take it, about non-United Machinery during the course of the years? A. Frequently, frequently, although Mr. Boyd never considered himself a shoemaker per se. [215] Mr.

Boyd is a brilliant man but leaned on the financial side. He never had too much factory experience. He is very brilliant, I am not—

Q. Do you consider yourself a shoemaker per se? A. I would like to. I lived in a shoe factory for 20 years part time, and the rest of the time—

Q. Before December, 1955, on how many occasions would you say you discussed with Mr. Henry Boyd— A. I would not have any idea.

Q. —your problems in shoemaking and shoe machinery? A. I did not discuss with him ever, to the best of my knowledge, about our problems in shoemaking.

Q. I am sorry, I will rephrase that question. You did not discuss with him Hanover's problems; is that what you mean to say? A. No, we confined—that question was confined to shoemaking.

Q. All right. I will ask the question in the broader terms as to whether you discussed with him, before 1955, shoe machinery and the availability [216] of shoe machinery of all kinds. A. Yes, on occasion.

Q. How many times did you have discussions with him before September, 1955? A. I would not have the least idea. Whenever I ran into him in a shoe show or accidentally in New York or some other thing. I wouldn't have the least idea how many times I saw him in that period.

Q. You are accustomed to visit the annual shoe shows in this country? A. Off and on. I do not go regularly.

Q. Chicago and St. Louis. A. I have never been to St. Louis but once to a shoe show, and that was many years ago.

Q. And on those occasions you would meet Mr. Boyd? A. Not all of them. Perhaps he wasn't there. Many occasions we were together.

Q. Is it fair to say six or ten times you have talked over the subject of shoe machinery with Mr. Boyd before 1955? A. Yes, I think so.

Q. And you did not hold back any knowledge you had from him, did you? [217] A. We never held back anything from each other knowingly.

* * * * * *

[219] Q. You were interested in buying shoe machinery for which no royalty or rent would have to be paid, weren't you, at that time? A. Very much so.

[220] Q. That fact does not refresh your memory? A. No, it doesn't refresh my memory. I see no reason way it should. That machinery they used, no doubt we tried a lot of it. We tried some 40-odd machines on trial, bought about 20, and 10 of them we shouldn't have bought. I don't think they knew anything we didn't know about the availability of shoe machinery.

* * * * *

[233] Q. Now, is it the fact that after the organization of the technical committee in 1949 you participated actively in its proceedings?

* * * * *

[335] Q. You examined the material submitted to you by Mr. Anthony, did you? A. Oh, I beg your pardon.

Q. I said, do you remember? I am asking you now. A. Yes, I remember quite a little bit. The major themes.

Q. Tell us what you remember about it. A. Well, the particular things I remember was, of course, the cost of

capital which I heartily disagree with, and there are some other things in the book I disagree with a good deal.

Incidentally, it was the opinion of my associates we were not going to accept a lot of his theories of how to measure whether to buy or not to buy a machine, the purchase of a machine.

Q. When you refer to his having mentioned the cost of capital, you disagree with, are you referring [336] to page— A. I don't remember what page.

Q. I am just going to ask you. A. All right.

Q. When you referred in your answer to his having discussed the cost of capital and the way you disagreed with it, were you intending to refer to discussion at page 39 of this book called "Required Earnings Rate"? A. No. I wouldn't possibly know. There was a great deal in his book that I disagreed with completely.

Q. Would you be good enough to direct your attention and please be so kind as to direct your attention to this "Required Earnings Rate" part regardless of whether you disagreed with other parts? A. Do you wish me to re-read it?

Q. Yes, if you have to re-read it. A. Well, I do.

Q. Tell us if that is the part to which you previously testified you didn't agree with Mr. Anthony about?

Mr. Hayes: By your question, Mr. Carson, [337] do you mean one of the parts?

Mr. Carson: One of the parts, yes.

(Witness reads document.)

A. I read this much. Now if you—

Q. Do you know what my question is? What are the parts you disagree with? A. I disagree with this whole page I read, practically, in its entirety.

Q. All right, now, you noticed the sentence on that page which says:

> "The other factor that needs to be thought about is the earnings that you expect to make on an investment in shoe machinery."

A. Yes.

Q. "This is expressed as a rate, or per cent, figured after income taxes."

Part of that you disagreed with, is that it? A. Beginning up here I disagreed with the "after taxes."

Where is it? Right here. I disagreed with that heartily. This part down here I heartily disagree with.

Q. I am directing your attention to the whole sentence, not just the words "after taxes." [338] A. That is practically the sentence, isn't it, here?

Q. I read you two sentences. Is that part of the section you disagreed with? A. Yes.

Q. All right, that includes the words "after taxes." A. Yes.

Q. And you knew at the time what—

> Mr. Carson: Does your Honor wish to look at this so he can borrow it?
>
> The Court: Yes.

Q. And you knew at the time that you were looking at the manuscript, or the book, what per cent Mr. Anthony thought ought to be taken by shoe manufacturers as a cost of capital in connection with deciding whether to buy shoe machinery or to lease it, did you? A. Yes, sir.

Q. What figure was it that you understood he recommended? A. On this page I just looked at?

Q. Well, I am just asking if you can remember, if you carry it in your mind. A. No, my memory—with reference to 5 or 6 [339] per cent on the page we were talking about. I remembered it after I read it, of course.

Q. You see on page 39 the words:

> "The appropriate figure is considerably higher than the interest rate of 5 or 6 per cent."

Is that what you are referring to? A. Appropriate figure of what?

Q. I was calling attention to the middle. Is that what you were directing my attention to? A. Yes, sir.

Q. At the end of his discussion of that subject on the bottom of page 40, I call your attention to the fact that he gives a figure overall which may be—I am paraphrasing—30 per cent or 35 per cent or even higher, and he ends by saying:

> "It seems likely that most shoe manufacturers will want to use a rate that is somewhere between 10 per cent and 20 per cent."

Do you see that? A. Yes.

Q. And you knew that at the time you were examining the manuscript of the book? [340] A. I doubt if I remembered anything or considered anything contained in Mr. Anthony's book when we were considering purchasing machinery.

Q. I am merely asking you whether you knew what is written here as the views of Dr. Anthony at the time, whether you agreed or disagreed. A. At the time we were—

Q. In 1955. A. —making up our mind to buy. No, I doubt if I remembered what Anthony said. I disagreed with Anthony's book, cover-to-cover almost with the exceptions.

* * * * *

[398] Q. You recall, do you not, that yesterday Mr. Carson examined you in some detail concerning the activities of the Technical Committee of the NSMA vis-a-vis United Shoe during 1950? A. Yes, sir.

[339] Q. And do you recall that he called to your attention the fact that the rates were increased on July 31, 1950? A. Yes, sir.

Q. I show you Exhibit D-21, which was marked in evidence yesterday, and I direct your attention to the third paragraph, which begins at the bottom of page 1. Would you read it, please. A. Shall I read it aloud or read it—

Q. No, no, to yourself.

Have you read it? A. I read this, yes, sir.

Q. Now I ask you, Mr. Sheppard, whether before July 31, 1950, the Technical Committee and you knew that the United Shoe Machinery Corporation was planning an increase in rates. A. I think there had been some rumors, but at this meeting that this refers to it seems that probably Mr. Brown was asked and spoke about it.

Q. So was the July 31st notice of increase a complete surprise to you? A. Well, the way in which it was done I think was a surprise to the whole industry.

Q. Was the fact that there was an increase a [400] surprise to you? A. No.

Mr. Hayes: Would you mark this for identification, please.

(Marked Plaintiff's Exhibit 24 for identification.)

Mr. Hayes: I have asked that there be marked for identification a communication from W. W. Stephenson, S-t-e-p-h-e-n-s-o-n, to the Technical Committe naming eight members, one of whom is L. B. Sheppard, August 29, 1950, to which is attached a proposed—it was denominated a proposed statement from the Technical Committee to the United Shoe Machinery Corporation.

Q. Mr. Sheppard, I hand you Exhibit P24 for identification. Did you receive that as a member of the Technical Committee? A. Yes, sir.

Q. And was there attached to it the proposed statement which is presently attached to it? A. Yes, sir.

Mr. Hayes: I offer it in evidence.

Mr. Carson: No objection.

The Court: Admitted.

[401] (Plaintiff's Exhibit 24 for identification received in evidence.)

Mr. Hayes: Would you please mark for identification—and this was Defendant's 252 for identification on Mr. Sheppard's deposition—this document entitled "Opening Statement at the Meeting with the Shoe Manufacturers Technical Committee."

(Marked Plaintiff's Exhibit 25 for identification.)

Mr. Hayes: May we have permission to withdraw this in order to make these copies? Could you then do that for us?

The Clerk: Yes.

The Court: Do you need it at the moment?

Mr. Hayes: No, no, overnight will do.

The Court: All right. Give it to Mr. Frank.

Q. Mr. Sheppard, you testified yesterday to a meeting between certain members of the Technical Committee and high officials of the United Shoe Machinery Corporation, which took place, if I recall correctly, at some date in September, 1950, at which you were present. Do you recall testifying to that? A. Yes, sir.

[402] Q. And at that meeting was Mr. Brown present? A. Yes, sir.

Q. And who was Mr. Brown at that time? A. Mr. George Brown was the president of USMC.

Q. Did he make a statement at that meeting? A. Yes, sir, quite a lengthy statement.

Q. And I show you now Plaintiff's Exhibit 25 for identification and ask you if that is a copy of the statement. A. I am quite sure it is.

Mr. Hayes: I offer it in evidence.

Mr. Carson: What was the witness' answer to that?

Mr. Hayes: "I am quite sure it is."

Mr. Carson: No objection.

The Court: Admitted.

(Plaintiff's Exhibit 25 for identification received in evidence.)

Mr. Hayes: With your Honor's permission I would like to read into the record a short excerpt from each of these exhibits.

The Court: You mean 24 and 25?

Mr. Hayes: Correct.

[403] Exhibit P-24, which has been identified as the communication from Mr. Stephenson to the Technical Committee to which was attached the proposed statement from the Technical Committee to the United Shoe Machinery Corporation, sets forth at page 4 specific suggestions that the NSMA was making to United Shoe Machinery Corporation, and now I read.

(Mr. Hayes reads from Plaintiff's Exhibit 24 in evidence.)

Mr. Hayes: I skip No. 1.

No. 2:

(Mr. Hayes continues reading from Plaintiff's Exhibit 24 in evidence.)

Mr. Hayes: I read now from Exhibit P-25, Mr. Brown's statement at the meeting with the Technical Committee at some date in September, and it reads, beginning at the bottom of page 8:

(Mr. Hayes reads from Plaintiff's Exhibit 25 in evidence.)

Mr. Hayes: I skip No. 1 again.

(Mr. Hayes continues reading from Plaintiff's Exhibit 25 in evidence.)

By Mr. Hayes:

Q. Now, was the meeting in September, 1950, [404] at which Mr. Brown made that statement, the same meeting

at which you testified you were the spokesman for the Technical Committee? A. Yes, sir.

Q. Would you tell us what you said as spokesman of the Technical Committee so far as you can now recall? A. I said nothing until after Mr. Brown had finished his opening statement, which had been prepared; he evidently was reading from it. Now, I am sorry that I can't tell you what I said. I was quite upset, quite infuriated, at Mr. Brown's paternalistic attitude toward the entire industry and his posing as a benevolent benefactor of some kind—not he personally, I don't mean that—as a benevolent benefactor over all these years, and then during part of that dissertation lecturing us on how fortunate we were in having somebody tell us how to run our business and not—I am sorry, I don't know what I said. You will have to get that from somebody else.

But I told him I did not appreciate the attitude, and that we had come there in good faith to discuss our mutual problems; and as indicated in that [405] memorandum, the two things I think the manufacturers were most anxious to discuss were the two points on modifying leases so that after a machine had earned itself out three or four times maybe you could buy it or they'd give it to you. That wasn't in much detail but that was the theory, the two points I referred to. And the door was slammed on that pretty quickly by stating that since they had a case pending before the District Court they wouldn't discuss leases or anything else about and then added, as I recall—my memory was refreshed by your reading it—adding that it sounded like perhaps we didn't want any leases and he thought that was pretty ridiculous and could not believe it.

I am sorry, I can't—I think maybe I was a little bit heated up.

Q. Is that the substance of what you said in so far as you can recall? A. In so far as I can remember.

• • • • •

[410] Q. This morning also Mr. Carson, in referring to various of the tabulations that had been prepared by Mr. Spears prior to the 1955 purchase, brought out that one Goodyear rapid lockstitch was continued on lease; do you recall that? A. I do.

Q. Will you give us the reasons why that was continued on lease, one machine? A. Yes, sir. I think—I have testified on that one particular machine before, but the reasons were that we bought X number of Goodyear stitchers, and it was, as I recall, a rather tight fit on production. We had two lease machines in the plant when we made the final decision to purchase machines that we did purchase.

Q. You mean two lease machines over and above you purchased? [411] A. Over and above.

And in talking it over, because of the narrow margin of production ability, because if a machine broke down it could not be almost immediately repaired, we thought it wise to continue this machine on lease as a spare machine, and if a day's work involved some more difficult Goodyear stitching than a normal day's work and the operators got a little bit behind, they could throw this machine in. It was a part-time machine and has always been considered a part-time safety substitute.

• • • • •

[2314] "Q. Were machines offered to you that you did not buy? A. I don't remember that one way or the other. The company's policy was very definitely to buying machinery instead of leasing them if they could buy them. That has been the feeling since I have been with them in 1921."

* * * * *

[2315] "Q. Well, in view of what Mr. McAllister has stated, let me put it this way, Mr. Sheppard: Can you say whether or not your company, before 1955, purchased from United Shoe all of its machines available on optional terms for purchase or lease? A. Yes. I can—" then there is an interruption.

[2316] "Q. Which were adapted to the operations of your company? A. Yes. I can say we did not.

"Q. You did not? A. No.

"Q. Now, am I correct in my recollection that you previously testified that your desire and your purpose was to buy all the machines that you could rather than lease them? A. Yes; you are correct as a general statement.

"Q. Can you state any reason why in those circumstances you did not purchase all the machines available to you on optional terms? A. There I think you'll have to be more specific as to what machines you're talking about, Mr. Carson. There are different reasons why we did not buy certain machines.

"Q. Can you state any of the reasons? A. Yes. They're priced too high; it would take too long to pay for them based on the rental and royalty—rental, not royalty, that was being charged for them; they were low-cost machines and would perhaps take ten years to pay for in some

cases, and in some instances there were either rumors of or actually had later models [2317] come out to supersede the models that were offered. So—

"Mr. McAllister: To clarify that answer, when, Mr. Sheppard, you referred to them as low-cost machines, what did you mean?

"The Deponent: Low cost as to rental.

* * * * *

[2322] "Q. Were you familiar prior to 1955 with the availability to purchase of shoe machinery made [2323] abroad, Mr. Sheppard? A. Prior to what year?

"Q. Prior to '55. A. Oh, yes.

"Q. Did you give consideration to purchasing in foreign markets such shoe machines adapted to your manufacture as you considered were too expensive on lease from United Shoe? A. Yes.

"Q. Did you make any such purchases? A. Yes.

"Q. Can you identify the machines? A. From memory?

"Q. Yes, sir. A. No, sir.

"Q. In a general way? A. Yes, sir. We brought a number of machines in on trial. Some we purchased and some we didn't. We returned and, upon another occasion, we junked some machines.

"Q. Which had been bought by you abroad. Is that what you mean? A. Yes. They were made abroad."

Mr. Carson: I think the answer is continuous.

"[2324] A. We, beginning about 1950, I suppose, we became interested in machines that were available for purchase that would be suitable for our purposes, and we tried two or three different kinds of clicking machines.

We tried several clickers made by Bata in Canada and we tried a Montreal clicker—I can't give you the name of the company—"

Mr. Carson: And then Mr. McAllister:

"Montreal Shoe Machinery Corporation.

"A. —and, I think, another one whose name I can't recall, and finally wound up by buying rather rapidly within the next couple of years a good many of these, of the Montreal shoe Machinery Company's clickers.

"Q. Did you use those to replace machines leased from United Shoe? A. Yes, sir.

"Q. Did you find them as satisfactory— A. Yes, sir.

"Q. —as the United Shoe Machines? A. Yes, sir. We did.

"Q. Why did you not replace all the United Shoe machines with foreign purchases? A. Well, we replaced, I think, all of the clicking [2325] machines.

"Q. And then how about the other types? A. Well, I'll move on to the other types now.

"Q. Yes. A. We experimented—we tried two stitchers. One was a German, a Goodyear stitcher, or similar to a Goodyear stitcher. It did the work of a Goodyear stitcher —an out-sew stitcher. That machine was unsatisfactory. We never could make it work properly in this country. And we tried an English stitcher. I think it was called Standard.

"Mr. McAllister: Standard Engineering Corporation, Ltd., to the reporter.

"A. That was a fairly satisfactory machine and is still in our plant. It is not as satisfactory as ORL.

[2326] "Q. What is the ORL? A. The United machine.

"Q. What other foreign purchases did you make? A. We made a number of both attempts and actual purchases. I'm afraid I can't, from memory right now, give you their names without referring to some notes.

* * * * *

[2330] "Q. Were you interested in purchasing shoe machinery? A. Yes, sir, since 1921, or '22.

[2331] "Q. Since 1922 you say you have been interested in buying shoe machinery? A. Yes, sir.

"Q. As far as you could? A. Well, I didn't answer yes to that one, your addition to the question, as far as we could do it advantageously and worth while.

"Q. In other words, you didn't have a policy of buying any and all shoe machinery but only such as you could buy advantageously? A. That is right, with one minor exception. I didn't bear down or insist too much on some of the little inconsequential 'pinky-doodle' machines that bore a very small relationship to our royalties and rentals total."

* * * * *

[2348] "Q. Do you remember having tried clicking machines from Montreal Shoe Machinery Company? A. Yes, sir.

"Q. Were they satisfactory? A. No.

"Q. Why not? A. I can't go into the mechanical details. They were frail and unsatisfactory. They were returned.

* * * * *

[2403] Mr. Hayes: That is all I am reading at that point.

Now, if you will turn, please, to page 133, [2404] below where it says "By Mr. Carson"—just below that referring to Mr. Cadwell, who is identified a few questions before, and this has to do with what was read in with respect to the purchase policy of Hanover, your Honor:

"Q. And had previously been with Freeman Shoe Corporation, as you stated? A. Practically all of his life he was vice president of Freeman.

"Q. As a member of the Technical Committee did he ever express to you any opinion concerning the desirability of buying rather than leasing shoe machinery? A. Many, many times.

"Q. What opinions did he express to you? A. We should make an intensive search to find outside machinery.

"Q. That you could purchase? A. That we could purchase. He practiced that at Freeman, and I think perhaps Freeman and ourselves and Weinbrenner in the men's welt industry were probably the leaders in the experimentation of trials and search for satisfactory machinery.

"Q. While Mr. Cadwell was on the Technical [2405] Committee he discussed with you that subject, did he? A. Oh, many times.

"Q. And told you what Freeman was doing? A. Well, not only during the committee sessions, and so forth, but outside of them. We kept in pretty close contact with each other, and to a much lesser extent with Weinbrenner as to, Are you trying a certain machine? How do you like it? How is it working? And so forth and so forth.

"For that reason Weinbrenner in some instances, Freeman in others, and ourselves in others did not try some

machine that the other had tried and found unsatisfactory and told us why it was unsatisfactory. There were no meetings together.

"Q. You kept in touch by telephone? A. Mostly, yes.

"Q. Who was the man at Weinbrenner that you kept in touch with? A. I can't recall. I was trying to recall when I mentioned Weinbrenner's name.

"Q. What type of machine was Weinbrenner experimenting with to your knowledge? A. A number of types, all affecting men's welt [2406] shoes. I can't name the machines. I don't know any more the crimp numbers of manufacturers."

• • • • •

Mr. Hayes: The word there is "crimp." I imagine it is a mistake, your Honor, but I don't know what to substitute for it, "crimp numbers of manufacturers."

"Q. Do you remember any names of manufacturers that you know of? A. No, I can't.

"Q. How about Sagem? Do you remember their experimenting with Sagem machines? A. Not unless his alias is Schwabe.

"Q. Would you remember Herman Schwabe talking to you about the Sagem machine? A. I don't think I ever talked to Herman Schwabe. If I did it was just a brief greeting.

"Q. What make of machine was Freeman experimenting with as far as you were involved? A. The same types of machines.

"Q. What manufacturers? A. A number of manufacturers, German machines, machines made in this country,

some English machines, but I can't possibly recall just what they were.

"Q. Can you fix the date when you first began [2407] these discussions with Weinbrenner and with Freeman? A. No.

"Q. Well, was it before or after the decision in the anti-trust case? Could you tell us that? A. Oh, it was before.

"Q. Was it before or after your 1950 discussions with the United Shoe people? A. I can't tell you that—probably not.

"Q. It was after you became president in 1940, I take it? A. I don't even—

"Q. You became president of Hanover in 1940? A. Yes. It was after then.

* * * * *

[529] Q. So this tabulation following, which I would like to describe in the record, is your analysis of your company's handling of all those United machines in that period of almost seven years; is that correct? A. This is the analysis of the 306 machines which Hanover had in its factory prior to the time they made the big purchase and which appeared on PS-4.

Q. Yes, I understand that. You started with 306 which were on Form A before the purchase of any of them October 10, 1955, don't you? A. Yes, sir.

Q. And then you took out one "economy insole channeling Model B" which was returned to United July 25, 1955. That's before the purchase. A. Yes, sir.

Q. And then you had 305 to deal with? A. Yes, sir.

Q. Then your next section of this description, tabulation, describes 19 machines returned to United on Septem-

ber 10, 1955, does it not, with the name of their [530] types? A. Yes, sir.

Q. And some of these are as in the other case, keyed by you to the type numbers in the Leidesdorf computation, are they? A. Yes, sir.

Q. Then your next entry—withdrawn.

You then subtract the 19 from the 305 and you have 286 left to be dealt with by the managment of Hanover, October 10, 1955? A. Yes, sir, that's right.

Q. You purchased, according to the notation on that date, 205 machines, leaving 81 still in the hands of Hanover?. A. Yes, sir.

Q. Then according to this entry, you returned to United October 29, 1955, 5 machines distributed between two types, which you described there? A. Yes, sir.

Q. That left 76? A. Yes, sir.

Q. Then in December 8, 1955, you returned one machine described there leaving 75? A. Yes, sir.

[531] Q. Then on February 1, 1956, you returned 10 of a one single type, leaving 65, is that right? A. Yes, sir.

Q. Then on February 7, 1956, you purchased one Skiver described there, leaving 64? A. Yes, sir.

Q. Thereafter, May 8, 1956, you purchased another Skiver leaving 63? A. Yes, sir.

Q. And then May 15, 1956, you returned one economy insole lipsetting machine, leaving 62? A. Yes, sir.

Q. Now that was May, 1956. The next month, June 8, 1956, the company purchased three machines of three different types leaving 59. That's right according to your notes, isn't it? A. Yes, sir.

Q. And one of those turned out to be a Goodyear automatic sole leveling Model D which is one of the 20 so-

called major types, and you have keyed it in to the number given in the Leidesdorf calculation? A. Yes, sir.

Q. And we had 89 left? [532] A. 59.

Q. I beg your pardon. You are quite right. 59. On June 30, 1956, according to the document, 47 were purchased by Hanover of nine different types, is that right, leaving 12? A. Yes, sir.

Q. And two of those so purchased were keyed by you to the 20 major types in the Leidesdorf calculation? A. I note that there are a couple machines here that are similar, Mr. Carson. I don't think there are nine types. There are two that are identical.

Q. You are right. There are eight types, maybe seven. Thank you.

The next transaction on the United machines was the purchase of three, August 4, 1956, of a single type leaving nine, is that right? A. Yes, sir.

Q. Then next, September, on the 10th, you purchased one more of the same type, edge trimmer, same model, leaving eight? A. Yes, sir.

Q. October 8, 1956, you purchased another edge trimmer, leaving same model, leaving seven? [533] A. Yes, sir.

Q. On November 10, 1956, you purchased a Skiver, leaving six, is that right? A. Yes, sir.

Q. And then at different dates, as you told Mr. Hayes, beginning March and ending August 1960, you returned three of the machines previously on lease, leaving three? A. Yes, sir.

Q. Then you bought two of those three, one August 10th and one August 13, 1960, leaving again the famous Goodyear outsole rapid lockstitch still on lease? A. Yes, sir, that's right.

Extracts from Deposition of Purtell

Q. Did you participate in meetings with management from time to time during this period of about seven years in which these different decisions were made to return the lease or the purchase? A. The only meetings that I attended were back at the beginning in 1955 when they made the big purchase, and I believe possibly in '56. Mr. Carson, when they made the second big purchase. The other single or minor purchases that were made, I didn't attend any meetings in regard to those decisions.

* * * * *

[1755] Now Defendant's Exhibit 58 in evidence—"what the discussion with Herman Schwabe was, referred to there? A. I believe that it was an Albeko channeling machine which he had in operation for a period of time. We did have some channeling knife problems with this machine and this letter was in clarification of the credit that had been extended on the knives that were being sent back and forth for evaluation as well as our requirement for additional machines to cover our production on the channeling operation.

"Q. What was your discussion with Schwabe on the subject of the Albelko channeling machine? A. I cannot tell you in particular other than the fact that it was being evaluated in comparison with the machines that we had from United, if they were satisfactory from quality as well as performance [1756] standpoint.

"Q. What did you ultimately determine with respect to the Albeko machine? A. We purchased, I don't know the quantity, but these Albeko machines to do our channeling.

"Q. And in that connection you returned the United

machine then on lease, did you, or machines? A. In that connection I believe we did return the United machines.

* * * * *

[1759] "Q. Didn't you at some time receive instructions from somebody in The Hanover Company to go into foreign machinery and see what the company could do? A. I do not recall an instruction as such. I believe that we were involved as much as anyone in the industry in the evaluation of machines and I believe that we were doing the normal amount of investigation that was going on during these times.

* * * * *

[1762] "Q. You were too busy to go into the Sagem machines as you understood that they would take quite a lot of study, is that a fair statement? A. No, I wouldn't say that entirely. I would say that the evaluation of the Sagem machines, since they already were being evaluated by someone, that we felt through relationship in the industry that we could acquire what their experience had been with [1763] those machines."

Mr. Hayes: Would you mind reading the next question and answer?

Mr. Carson: At Mr. Hayes' request:

"Q. Did you ever acquire Weinbrenner's experience on the Sagem machines while you were at Hanover? A. I am not sure of the time but I am sure that either through correspondence or by way of telephone, that I discussed some of these machines with representatives of Weinbrenner."

* * * * *

Paul E. Spears—Direct

[433] PAUL E. SPEARS, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Hayes:

Q. Where do you reside, Mr. Spears? A. Hanover, Pennsylvania.

Q. By whom are you employed? A. The Hanover Shoe, Inc.

Q. In what capacity? A. Treasurer.

Q. Do you hold any other position in the company? A. I am on the board of directors.

Q. Do you hold any position in Sheppard & Myers, Inc.? A. Yes, sir.

Q. What position? A. I am the treasurer and also a member of the board of directors.

[434] Q. How long have you been in the employ of Hanover? A. Since May 1, 1953.

• • • • •

[544] Q. Now, I think the next one is Goodyear welt butting and tacking machine opposite which you have written in close contact with the name, "Buy them both["], but there is an additional notation in the right-hand part of the page. Will you read it? A. "Buy these machines because of capital return."

Q. You wrote those words? A. Yes.

Q. What did they mean? A. I think it meant that the number of years that it took Hanover to recover their investment. In other words, we could get our money back comparing the amount of money which we would expect to pay for the machine in two and six-tenths years as compared to the amount of royalty and rental we would have paid for the machines if we had continued leasing them.

• • • • •

[545] Q. Attached to the next, USMC wiring machine, it states "Do not buy since it is a low yield machine." A. I would presume it meant it took the company too long to return its money on the investment in order to buy it.

• • • • •

[2000] RICHARD M. CYERT, called as a witness, being first duly sworn, testified as follows:

Direct Examination by Mr. Hayes:

Q. Where do you reside, Dr. Cyert? A. In Pittsburgh, Pennsylvania.

Q. And what is your present employment? A. I am the Dean of the Graduate School of Industrial Administration at Carnegie Tech.

Q. Would you state your general and professional education, Doctor? A. I received a Bachelor of Science degree in economics at the University of Minnesota, Ph.D. in economics at Columbia University.

Q. You graduated with highest honors from the University of Minnesota? A. Yes.

Q. In 1943? A. Yes.

Q. You belong to Phi Beta Kappa and Beta Gamma Sigma? A. Yes.

Q. Now, would you state for the record, please, what your teaching experience has been in the economics [2001] field? A. Well, I have tried a variety of courses in economics. The range has been from elementary economics at both what the economists call micro and macro level, the study of the firm, and the household, and also the study of the economy as a whole; I have taught graduate courses, Ph.D. courses in economic theory, I have taught

a first year graduate course to Masters students in the economics of the firm; in addition, I have taught several courses in managerial economics.

Q. At what institutions did you teach? A. Well, most of my teaching has been at Carnegie Institute of Technology. I taught a couple of summer sessions at the University of Minnesota, and while I was a graduate student at Columbia I taught at City College of New York.

Q. Have you been the recipient of a Ford Faculty Research fellowship? A. Yes, I have.

Q. Have you been director of any project for the Ford Foundation? A. I have been director of a project that we had running at Carnegie Tech for about the last five [2002] or six years which we called the behavioral theory of the firm, the funds have been contributed by the Ford Foundation, the project has been run at Carnegie Institute of Technology. I have published a number of articles as a result of that research and there is a book coming out in April of 1963 published by Prentice-Hall.

Q. And during the time at Carnegie Institute, have you gone through the usual steps of assistant professor and professor and head of department, and so on? A. Yes, I actually started as instructor since I went there before I had my Ph.D. and went through the ranks to professor, and in February of this year, 1962, I became the dean of the school.

Q. I assume you had the usual war service? A. Yes, after my undergraduate degree, I went into—in 1943, I went into the Navy and I was in the amphibious forces during the period 1943 to '46.

Q. Now what are the professional societies of which you are a member? A. Well, I belong to the American

Economic Association, the American Statistical Association, the Econometric Society, and the Institute of Manage- [2003] ment Sciences.

Q. Have you had any activities as a committee member or otherwise in connection with those associations? A. Yes, I have been a member of the committee established by the American Statistical Association on the use of statistical techniques in sampling; I have been chairman of the Research Committee of the Institute of Management Sciences, and I was elected a year ago, I believe, vice-president of Research and Education of the Institute of Management Sciences.

Q. Have you done any consultation work with industrial firms or related firms? A. Yes, over the years I have done a variety of consulting, that has been encouraged at Carnegie Tech, we are limited to one day a week. Our feeling is that this does aid in teaching.

I have had relationships which have lasted over the years with a consulting firm, originally, Touche, Mann, Bailey & Smart, now called Touche, Ross, Bailey & Smart. I currently do consulting for them. I am a consultant with Gulf Oil. Over the years I have done jobs for a variety of firms:

Pittsburgh Plate Glass, Federated Department [2004] Stores, Fruehauf Trailer, Chrysler Corporation, Kaufman Department Stores—Kaufman's Department Store in Pittsburgh, Gimbel's Department Store in Pittsburgh, I am sure there are some others.

In addition, I have been a consultant to the Air Force and also to the Post Office of the U. S. Government.

Q. Was one of the other firms for whom you did consulting work the Mellon National Bank? A. Yes.

Q. When were you first consulted by my firm in connection with this case, Dr. Cyert? A. I believe it was in July of this year, July 1962.

Q. And in the course of your retainer, have you examined the Leidesdorf reports that have been marked in evidence here? A. I have.

Q. Marked Plaintiff's Exhibits 37, 41, 42, 43 and 46. A. Yes.

Q. Have you, in addition, been supplied various other exhibits by us since the trial in Scranton? A. Yes, I have.

[2005] Q. And you were present in the courtroom, were you not, during the testimony of Dr. Corson? A. Yes, I was.

Q. And you have examined Defendant's Exhibits 47 to 52, which were put in evidence, I believe, during Dr. Corson's direct testimony last week, have you not? A. Yes, I have.

Q. And have you since then—and I think it was last night, if I recall correctly—examined the exhibits which are now marked Defendant's Exhibits 79, 80 and 81 and Plaintiff's Exhibit 77 which has just been marked? A. Yes.

Q. Did you hear—I take it you did hear—Dr. Corson express criticism on the Leidesdorf reports, or calculations, on three main grounds, to wit, the failure to give effect to cost of capital; two, the failure to give effect to future worth of investments; and three, the failure to give effect to taxes; is that right? A. Yes, I did; yes.

Q. And in the light of your examination of the various exhibits that were put in through Dr. Corson, and your study of Dr. Corson's testimony, can you tell [2006] us

what in your opinion is the relation between the terms "cost of capital" and "future worth of investment" as they were used in the Corson calculations. A. Well,—

Mr. Carson: I object to that as unnecessarily obscure. It seems to me to be the prelude to a statement by the witness.

The Court: Sustained. I think maybe you can reframe your question, Mr. Hayes.

Q. From your study of the exhibits put in there through Dr. Corson, did you note any relationship between cost of capital, as used by Dr. Corson, and future worth of investment as used by Dr. Corson? A. Yes.

Q. And what relationship did you discover? A. Well, the figure that is deduced as I believe the absolute minimum cost of capital by Dr. Corson is then used to determine through a compounding procedure, the future value of net streams both of net leasing and of ownership. In other words, these are compounded for 17 years using a 14 per cent rate of interest, which is the figure which is determined as a cost of capital.

Q. Now, is the expression "cost of capital" one [2007] that is currently in use among economists? A. Well, the cost of capital is a term that is in use and has been in the theory for some time. It is only recently that attempts have been made to actually measure the cost of capital. If I might just, to establish this point, and perhaps clarify it, I think a statement by Ezra Solomon in the book which was used earlier, "The Management of Corporate Capital,"—Solomon is the editor and he also has an article here—this article was published in 1955—

Q. Will you give us the title of the book? A. The title of the book is, "The Management of Corporate Capital."

Q. That is one of the books that Dr. Corson referred to, is it not? A. Yes. Ezra Solomon, who is the editor of the book, was in Chicago at the time. He is now at Stanford:

> "Although the concept of cost of capital—"
>
> Mr. Carson: May we have the page?
> The Witness: 129.

A. (Continuing) "Although the concept of cost of capital has always been made a central part in the [2008] theory of capital the problem of defining and measuring this concept has received almost no attention at all. Quite apart from the practical difficulties of measuring capital cost for a specific company, there is today no explicit and generally acceptable account of what is the correct concept, actual approach to its measurement."

Then skipping a little bit:

> "The best known exception is the work of Professor Joel Dean, but even his most comprehensive statement regarding the cost of capital is neither explicit nor complete."

And there is a footnote then to Dean's study on "capital budgeting" and two other discussions.

[2009] Q. Would you say that this is a relatively new idea, this idea of measuring cost of capital—relatively new among economists, I mean? A. Yes. This piece of Solomon's was published in 1955 and, as you see here, he said, and I agree, that there has been almost no explanation of any attempt to measure the cost of capital.

Mr. Carson: Could I have the question and answer read?

(Record read.)

Q. As economists use the term "cost of capital," what is the purpose that they have in mind?

Mr. Carson: Objected to, your Honor. I don't see how he can tell what different economists have in mind.

The Court: Yes. Sustained.

Q. What is your interpretation, Doctor, of the concept of cost of capital? A. The cost of capital generally refers to a relationship between anticipated earnings and stock prices. Let me, if I may, quote a couple of definitions to indicate the general usage.

The first is—

Q. Would you identify the book? [2010] A. The first is from a book named Managerial Economics by Neil E. Harlan, Charles J. Christenson and Robert F. Vancil. They are all from the Harvard Business School.

Q. What page is that? A. Page 260 and page 261.

"The preceding paragraphs consider how a fixed capital budget should be spent, but how should the size of that budget be determined? To answer this question, we must introduce the concept of the cost of capital. The cost of capital to a company is the rate of return expected by investors on capital funds they place at its disposal."

Then there is a paragraph that is irrelevant.

"While the definition of cost of capital might seem perfectly clear on a conceptual level, there are a host of difficulties in determining it in practice. Most of these difficulties center around the problem of measuring the 'cost' of common stock financing, since shares of common stock do not carry a fixed rate of return as do bonds and shares of preferred stock. The whole topic of cost of capital is currently an area of [2011] great controversy among finance specialists. This controversy is beyond the scope of this book."

There is a quote that I could pick out of Dean which defines the cost of capital in essentially the same way.

Q. What is the date of the imprint— A. 1962, Managerial Economics, April 20, 1962.

Q. What is the Dean book to which you referred? A. The Dean book is 1951. This is called Managerial Economics also.

Mr. Carson: May we have the Dean identified?

Q. Joel Dean, is it not? A. Yes, Joel Dean.

Q. In your opinion, is the cost of capital as used in the fashion in which you have explained it to us a cost in the accounting sense? A. No. I would like to elaborate on this a moment if I could because I think a great deal of confusion has been generated in the courtroom by the way this term, cost of capital, is used.

The notion of cost of capital is used and attempted to be measured to serve as a guide to management in a capital budgeting procedure. It is not a [2012] cost in the sense that one pays out some money equivalent to this

particular rate. It is a managerial guide and a number of companies, for example, have used a variety of devices to guide themselves before the notion of trying to measure cost of capital was developed.

I don't know whether we want to go into that at this point, but there are a number of companies, for instance, who have tried to improve the efficiency of their investment by using certain cutoff rates where they say, "We want our investment to achieve this minimum," so that that cost of capital is not some sort of magical thing and we are not really dealing here with witch doctors; this is a guide—it is an attempt to measure something and then to try to use it as a guide.

It does not in any sense represent money paid out.

Q. Cost in the accounting sense? A. It is not a cost in the accounting sense.

Q. As I understand it, your testimony is that there is no general acceptance that you are aware of in your capacity as an economist and in your relationship in the economic fraternity—

[2013] Mr. Hayes: I better have that over again.

Q. I will start over again. As I understand your testimony, there is no general acceptance among economists that you have ever heard of as to how to measure this concept of cost of capital?

Mr. Carson: Objected to as leading.

The Court: I will take it. Overruled. Go ahead.

A. There is no general, accepted procedure. This is an area that is under controversy. If you take a look at the Solomon book, almost every article in there will have

some reference to the fact that this is difficult to measure.

As a matter of fact, a great many of the articles there are attempts to put forth different versions of trying to get at a part of this problem. As I read, the Dean attempt, which in a sense was an early one and was fairly detailed, is, in Solomon's view, at lease, incomplete and I will have some things to say about that, I am sure, as we go along.

Q. Would you elaborate a bit on the statement you made, Doctor, that this concept of cost of capital is one which is generally used, when used, as a guide to management? I think that is the language you [2014] used. A. Yes. Let me do this perhaps with reference to some of the things that have been said in this courtroom.

The Court: Do you want a recess or do you want to go right through today? Off the record.

(Discussion off the record.)

The Court: We will take a brief recess.

(Short recess.)

Mr. Carson: May we approach the bench, your Honor?

The Court: Yes.

(Discussion off the record at the bench.)

By Mr. Hayes:

Q. Do you remember the last question? A. Yes. You wanted me to elaborate on your earlier statement.

The cost of capital is what I would call a guide to management. It is a guide in the following sense: That the

firm may have a number of investment opportunities before it and it may have some problem of determining how much of its funds, for example, should be used for investment in a particular year. The cost of capital, as a guide, then, might indicate [2015] that, let us say, all those investments that it has anticipated will earn less than the return indicated by the cost of capital might be eliminated, and funds should be allocated only for the projects that would earn something equal to the cost of capital or above.

This is, as I say, a rough way in which this might be used as a guide. Unfortunately, in the real world, as I say to my students, this doesn't work out quite as easily because of the fact that there are different degrees of certainty and uncertainty with respect to particular investments, and when I say, "as a guide," I mean it is a guide and I don't mean it is a rule.

I don't think we are to the point yet in management where we can turn the management job over to a computer. We have made some strides in that direction but I wouldn't say this is an area in which we can do that.

Therefore, there may well be, when you are using the cost of capital as a guide—you may well make some investments, for example, that have a certain degree of certainty and a prospect of greater return that is less than the cost of capital and, at the same time, this may be balanced by some investments [2016] that are perhaps riskier but that have a higher anticipated rate of return, so that it is only a guide, and a rough guide.

If we ever get to the point where we can both measure the cost of capital accurately and meaningfully in such a

way that everyone agrees and we can also predict accurately so that we can get all of the data on prospective investments, then perhaps the whole problem of management with respect to investment will be simple, but it is not in that state now.

Q. You said that it was a guide and not, in substance, a determinant for management's decision? A. Yes.

Q. Are there other guides that management uses in making decisions with respect to whether to invest? A. Yes. There are a number of other guides that are used in a similar fashion, or you might say techniques. The most common one is probably the payback period.

Q. Would you explain that to the Court? A. The payback period, in its simplest form, would take the savings on a prospective investment and divide it into the cost of the investment. The resulting figure would show the number of years in [2017] which the investment would bring back its capital. It doesn't take account of any rate of return. It is a simple rule of thumb, but businessmen are simple and they are dealing with complex things and this is the way all of us proceed when we are dealing with complex factors; we have to get some rules of thumb and the payback period has been criticized severely by a number of people and there is some substance to the criticism but on the other hand there is also some value in it, one of the factors being that a short payback period is one of the ways in which management hedges against uncertainties.

If you have a short payback period, it means O.K., you are going to get your money back and if something happens, O.K., you have gotten out safely. There are a variety of other—

Q. Before you go to the variety, take this payback method in its simplest form; when that is used is any effect given to the tax consequences? A. No. This is usually gross. That is, it is savings before taxes.

Q. How would you apply it in the situation where a firm, such as Hanover—you are acquainted with the financial statements of Hanover? [2018] A. Yes.

Q. —had to elect between buying the machines, if they were available for purchase, let us assume, in 1939, and continuing to lease—how would the payback method operate? A. What you would do would be to take the amount of money that you were going to invest in machines and you would then try to compute what you would save over leasing—in other words, what you would save on leasing charges, taking into account any additional items you would pay if you owned.

Presumably, insurance and service would be additional costs if you owned. You would take the leasing charges that you would pay, subtract the additional cost to try to get a measure of what the savings would be by owning and then get this—what you would try to do would be to get the annual saving and divide this into the cost of that investment.

Q. And you would make a projection into the future, in effect, as to buying against leasing? A. Yes. What you would do is say, "This is what I am going to save annually," so that you are assuming that these savings are going to continue for a period of time.

[2019] Q. That is the payback method in its simplest form? A. Yes.

Q. Are there variations of that? A. Yes. There are some in which you, for instance, might subtract from

the savings interest that you might pay for the money that you would be paying out for your capital. There have been some attempts by a fellow by the name of Grant to tie this into a more complex method which he uses.

I wouldn't attempt to make an exhaustive category of all the variations of the payback method.

Mr. Carson: Could I have the first part of that sentence read?

(Record read.)

Q. I show you, Dr. Cyert, Plaintiff's Exhibits 52 and 53, which are headed "Cost of purchasing United Shoe Machinery machines compared to leasing-interest on borrowed capital," and in the case of Exhibit 52 it is at 6 per cent, and in the case of 53 it is 2 percent.

You have examined those exhibits, have you not? A. Yes, I have.

[2020] Q. Would you describe those exhibits—would it be accurate to describe those exhibits as a use of the payback method, taking into account interest at two different percentages? A. Yes. The final calculation has not been carried out but this is preparatory, I believe, to the calculation.

Q. Doesn't it show the credits and the balance? A. It shows the credits and then the balance and one could carry through to the final calculation.

Q. What would be the final calculation? A. To take the net savings and divide them into the cost of purchase.

[2021] Q. Has there also been advanced another guide to management, which takes account of obsolescence? A. Yes. George Turborgh, with—

Q. Will you spell that name? A. T-u-r-b-o-r-g-h.

Turborgh has a method which is basically a variation of another method, the annual cost method, which is an attempt to take into account the obsolescence of machines. There is an attempt to estimate annually the obsolescence of machines and use this technique to try to determine when a machine should be replaced.

Q. Has that been used extensively? A. My understanding—this based partly on conversation with Turborgh and partly on some of the complaints he has in his writings—that it has been difficult to get businessmen to adopt this particular technique. It tends to be a little too complicated in its required calculations. Also the obsolescence factor is a little bit like the cost of capital; there is difficulty in agreeing on what is the obsolescence, how to measure it. Turborgh thinks he can measure it accurately but other people are not quite as certain of this.

Q. Your mention of his writings reminds me, [2022] Doctor, that I forgot to ask you one question in connection with your qualifications, and that is, have you been the author of any books and articles? A. Yes.

Q. You mentioned one that is to come out next year? A. Well, I have written a fair number of articles. My guess is in the neighborhood of 25 to 30 articles.

Q. Will you mention some of the publications in which they appeared? A. I have published in the American Economic Review, Quarterly Journal of Economics, Journal of Political Economy, Journal of Business, Econometrica, Management Science, Administrative Science Quarterly, Behavioral Science.

There is a Canadian journal, Cost and Management, I think it is.

Q. Well, that is enough. You have written widely. A. They have been the major journals in economics and I would say in management and I might add that I have done some articles for the Journal of Accountancy and for the Accounting Review.

[2023] Q. How about books? A. I have two books now published in the field of statistical applications to accounting—it is really statistical sampling techniques in accounting. There are two books. I have this one, Behavioral Theory of the Firm, that is coming out in April. I have another one that is now in draft which we are hoping to have published in December of this year. We may not make it.

Q. In each of your books you have had co-authors? A. Yes.

Q. Is that largely true of many of the articles you wrote? A. Yes. This, incidentally, is characteristic of the way we work at Carnegie Tech. There is a tendency to be fairly inter-disciplinary and there is a real encouragement that existed when I was a faculty member and that I am now pushing also, for people to work together, especially when they come from different disciplines.

Q. You have mentioned various approaches as guides to management. You have mentioned the cost of capital, which has been used in this case by the [2024] defendant; you have mentioned the pay-back and variations of various kinds, without elaborating on them, the pay-back, and you have mentioned the Turborgh method—in your

experience, which is the most common and which is the least used of those methods? A. Well, I think probably, by all odds, the pay-back method is probably the most widely used. In terms of actual practice, so far as I know, no one is really using the cost-of-capital notion. I don't pretend to know every firm in the world, but I do not know as of now, unless maybe it is United Shoe, anyone who is using a cost of capital notion is setting up its—as a guide in setting up its investment policy.

Mr. Carson: What did the witness say after "I do not know as of now"?

(Record read.)

Q. And all of these methods are, as I understand your testimony, guides to management? A. Yes. I would like, if I could, just to elaborate on that briefly, because I think it would be useful to get a little elaboration on it and I would like to use the Harlan and Vancil book as a help. [2025] They go through a particular method which they start out by saying:

> "This section introduction is not intended as a comprehensive treatment of the subject of capital budgeting. It's purpose is, rather, to set forth an analytical approach which will help in the solution of capital expenditure problems within the business framework in which they arise. The approach suggested here is not the only acceptable one; and no effort is made to defend it as being superior to all others."

And they go on:

"Capital expenditures may be classified into three major types, depending upon the nature of the economic justification supporting them. The first two types are similar to classes of decisions we have already considered: (1) Expenditures made to reduce costs, and (2) Expenditures made to increase revenues. The third type includes expenditures justified on non-economic grounds. Often a single project will contain elements of two or even all three of these types of expenditures."

[2026] This is why I would like to emphasize the notion of a guide. There isn't any single technique or combinations of techniques which one can wrap together in some way and say that this is the way you make the decision. These things have a variety of elements in them and I have seen companies make an investment where they knew they were not going to get any return.

In fact, all of the steel companies—we have made a study of capital budgeting—all of the steel companies have a category which they call "investment necessities." Sometimes they divide them up between sales necessities and production necessities, where they say, "Basically this is an investment and we must make it if we are going to stay in business."

This is the kind of thing that might happen if a competitor came out with a machine that gives you a better product and better quality and the price and everything else is the same; and this is the kind of machine the company has to invest in if it is going to stay in this business.

I saw a case where a company had to move its plant from Pittsburgh to Bridgeport and they had [2027] to do

this because their competitor had done it, in order to give better service. In all cases there are varieties of expenditures, varieties of criteria, that come in and this is where the problem of business judgment must be used.

Q. Now lets get down specifically to this cost of capital. You mentioned already that there is great controversy as to how it should be determined; how it should be approached. What are the elements that are used when an endeavor is made to measure cost of capital? A. Well—

Mr. Carson: Objected to. The witness said he doesn't know in any case except United Shoe.

Mr. Hayes: To use the method as a policy.

The Court: What is the question, please?

(Question read.)

The Court: Overruled.

A. The usual attempt I think is to try to break down I think the type of capital, the various areas of capital as I believe Dr. Corson correctly pointed out into debt, equity, and retained earnings, and then to try to get some kind of measure which is forward-looking. At least on the equity, on the debt, [2028] there is no problem. No one has any great difficulty with measuring—

Q. Will you explain why, Doctor? A. This is actually —I think I read something on it earlier. This is because the rate of interest is affixed or explicitly stated at least on debt capital.

Q. You mean by that that when funds are obtained for an investment on a basis of debt that is your cost of capital, the interest that is paid? A. Right. Right.

Q. Proceed. A. On the—the big problem on this is the common stock, the equity capital. It is—what you need for a useful figure for cost of capital is something that is forward looking. The attempt, in other words, has to be to try to anticipate what the requirement—what rate of interest would have to be earned, what rate of return would have to be earned on this capital to get additional funds to that you are trying to anticipate earnings on the equity capital.

You see, if it is going to be useful it has to be forward looking, and the other problem is [2029] the retained earnings. It is not at all clear, you see, as to how the retained earnings—what the proper policy is toward retained earnings.

If I might again just use Dean on this, he puts it I think better than I can in terms of just remembering what he refers to as the so-called plow-back, a plow-back of earnings, which I think gets at the point.

> "The importance of retained earnings as a source of capital funds makes a plow-back policy an integral part of a firm's capital expenditure budgeting."

He said:

> "One guide to plow-back policy is that outlined by the capital rationing theory set forth in Section IV of this chapter. If a company follows this plan faithfully, it retains earning (up to the limit of a stockholder rebellion) as long as they can be invested at a return higher than the firm's cost of capital (e.g. 15 per cent). It pays out earnings that cannot be invested internally (either now or in the future) to beat this cost of capital rate."

[2030] This is one guide, and this is, I believe, a guide that Dr. Corson referred to. And what I'd like to point out is again there isn't any ironclad rule about what a guide is.

> "Another guide is suggested by the theory that dividends in the modern corporation are a kind of interest income (although more uncertain than contractual interest) if a plow-back policy is determined by this theory (which is set forth in more detail in Chapter I) then retained earnings would be a highly volatile residual left after paying stable dividends out of fluctuating earnings."

In other words, there you would pay a stable dividend, whatever the residual was after your earnings would be kept in the firm.

> "A third guide to plow-back policy is found in the notion that a certain percentage of earnings should be held back for contingencies and for growth. This is a long-run view of an average minimum amount of plow-back that would rate a prior claim on earnings over an integral business cycle."

So there isn't any single policy about how [2031] you handle retained earnings, how you determine what they should be, and therefore it becomes again difficult to argue what the cost of capital is on that.

Mr. Carson: Excuse me, may I have the title of the book, the year and the page the witness read from?

The Witness: I am sorry, "Managerial Economics" of Dean. This is the only book of Dean's that I have referred to.

Q. And the page number? A. The page number is 572 and 573.

Mr. Hayes: I think the year 1951.

Mr. Carson: He said that.

The Witness: Yes, whenever I say Dean, it will be the "Managerial Economics". I don't know whether I will refer to it any further or not.

Q. Now proceed as to how when the cost of capital is used, and what procedure is followed in attempting to arrive at the cost of capital of a company's stock. How would you go about it? A. There just isn't any single way that you go about it. This is the problem. Certainly—

Q. Well, suppose the company had stock out- [2032] standing on the market, take that situation, publicly held company. A. Well, if we had a publicly held company, one of the first things that one would try to do would be to look at the market to try to take a look at—to really try to predict what the stock was going to do over the—over the future. One of the things that one might do on this is to forecast the trend of earnings and say—looking at the past, this is where the trend of earnings might go toward the future. It is an attempt—you have to attempt to be forward looking in this thing.

Q. Well, would the market value of the stock come into the calculation? A. The market value of the stock would certainly come into the calculation, and further, what you would be attempting to do would be really through an anal-

ysis to try to look at the way in which the price of the stock was going to vary.

Q. And would an examination be made of the relation between the earnings per share and the price per share that the market placed on the stock of the company? A. This would be an element that would be [2033] important to examine, not—I want to emphasize—it is not the answer, you just don't make a measure of this and say this is the cost of capital. This is an element in the whole procedure of looking forward.

Q. But there would be a price earnings ratio based on the earnings per share and the market appraisal of the stock which would enter into the determination; is that correct? A. I would say that is correct in those cases where someone has the courage to try to measure this.

Q. Now, suppose a company was seeking to use the cost of capital method but it had no public market for its stock. What is done then? A. Well, I would—I think I would go along with—

The Court: May I ask this question:

What did you mean by your question, suppose a company was seeking to use the capital stock method?

Mr. Hayes: Cost of capital method, I should have stated.

The Court: For what purpose?

Mr. Hayes: For the purpose of a company to [2034] make an investment. That is what I intended to say.

Thank you, your Honor.

I should have included that in the question.

Mr. Carson: Could we have the witness' answer so far read.

The Witness: I don't think I have answered it yet.

(Answer read.)

The Court: I guess I caused all this trouble. All right.

Q. Will you start all over again, Doctor? A. What I was going to say is, I think I would go along with Dean on this, that probably the most reasonable kind of approach would be to try to get some companies that were in some sense similar to this company that were publicly held.

Now I'd like to point out that again that's easy to say, but in the real world again, companies aren't twins. Unfortunately, they just don't appear that way, and there are always something that are different. But again if you are going to be satisfied with a gross approximation, this would be one way of at least proceeding.

[2035] Q. And now take a situation, the third one I give you, again, if you desire to use the cost of capital approach in determining whether or not to make an investment, and the company you are looking at has no public market for its stock, and the statistics of no comparable company are available. A. Well, if you want an honest answer, I would throw up hands. I don't see how you can compute anything that's meaningful.

Q. Now, do you have before you, Dr. Corson, Defendant's Exhibit 47 for identification—

Mr. Carson: You mean Dr. Dean, don't you?

The Witness: You are going to have to get your sides split. We are going to have to start wearing numbers. You called me Corson.

Mr. Hayes: I don't quite—

The Court: You called him Corson and there is an objection.

Mr. Hayes: I see. I called you Dr. Corson.

Mr. Carson: You meant Dr. Dean, didn't you?

Mr. Hayes: No, I meant Dr. Corson.

The Witness: We are going to get numbers for the uniforms.

Mr. Hayes: Yes, names and numbers for all [2036] the players.

Q. Defendant's Exhibit 47, Doctor, do you have it before you? A. Yes, I do.

Q. You may recall that Dr. Corson testified as to Table I of that exhibit, that the last column, which was the earnings per common share, divided by the price at which the common shares sold represented in those years the cost of capital to Hanover, and he arrived—it doesn't appear on the schedule, but he testified to weighted average of 22.14 per cent, cost of capital to Hanover as determined on that table.

Do you remember that testimony? A. Yes.

(Pause.)

Mr. Hayes: I am sorry, your Honor, for this delay, but this is part of the late last night's work.

The Court: That is all right.

Mr. Hayes: Would you please mark as Plaintiff's

Exhibit 90 for identification seven sheets showing for each of the years which appear on Defendant's Exhibit 47, to wit, 1940, '41, '42, '48, '49, '50 and '51, the shares sold, split between sales to family [2037] and sales to employees.

(Plaintiff's Exhibit 90 marked for identification.)

Mr. Hayes: Would you have any objection, Mr. Carson, to Plaintiff's Exhibit 90 being marked for identification subject to the subsequent testimony of Mr. Spears who prepared it?

Mr. Carson: Well, we have marked it.

Mr. Hayes: Marked in evidence, I mean.

Mr. Carson: Marked in evidence?

Mr. Hayes: I didn't want to hold up Dr. Cyert by putting Mr. Spears on to testify.

Mr. Carson: May we go off the record a minute.

Mr. Hayes: Surely.

(Discussion off the record.)

Q. I call to your attention, Dr. Cyert, Plaintiff's Exhibit 80 for identification—

The Court: Excuse me, it is 90, isn't it?

Mr. Hayes: Yes, it looks like an 80 on it.

The Court: It is my fault. I wrote on it.

Mr. Hayes: I am trying to make myself popular, your Honor.

Mr. Carson: We have gone much further than was [2038] realized.

Mr. Hayes: Would you kindly mark for identification single sheet entitled, "Reconciliation of

Capital and Surplus per Balance Sheet to Book Value of Common Stock used to Determine Sales Price of Common Stock Sold from 1940 through 1951."

(Plaintiff's Exhibit 91 marked for identification.)

Mr. Hayes: You may recall, your Honor, that during the cross-examination of Dr. Corson I mentioned to him a certain stockholders agreement. I don't happen to have them right now, so for the purpose of my question I am going to state the substance. As a matter of fact I will need to call a witness with respect to the arrangement with the employees.

I just have one copy.

The Court: You may use it. If you only have one copy then use it.

Mr. Hayes: I have only the one, yes. I beg your pardon, we do have copies. This is one of the agreements.

Will you mark that for identification, please.

(Plaintiff's Exhibit 92 marked for identification.)

[2039]

Q. Now you have before you, do you not, Dr. Cyert, Plaintiff's Exhibit 90 for identification which lists sales to members of family and employees for each of the years where the sales were made—sales of stock were made according to Defendant's Exhibit 47? Do you not, Doctor? A. Except for 1948.

Q. You don't have 1948? A. No, it goes to 1949, '50, '51.

Mr. Hayes: We do have it.

The Witness: Well, let me make sure.

Mr. Carson: I don't have a '48 either.

The Witness: Maybe it was a bad year.

The Court: The original has a '48.

The Witness: I have one now with '48. Charlie gave me one.

Q. Now you do have it complete, do you not? A. Yes.

Q. And in addition you have before you Plaintiff's Exhibit 91, which is the reconciliation of the capital stock and surplus per balance sheet to book value of common stock used to determine sales price of common stock sold from 1940 through 1951? [2039-A] A. Yes.

Q. Now you have before you also, although I don't think you have ever seen it before, Plaintiff's Exhibit 92 for identification? A. Yes.

[2040] Q. Let me tell you in substance that as a special meeting of the stockholders at which Exhibit 92 for identification is the minutes, there was approved an agreement among the then existing stockholders, all of whom were members of the Sheppard and Myers family, the company having been originally started by two men, Mr. Sheppard and a Mr. Myers, and under the terms of this agreement they contracted, and the corporation was a party, speaking again in substance, that no existing stockholder would sell stock to any outsider without first offering it to the stockholders who had a certain period of time, if I recall rightly, thirty days to decide whether they would buy or not, and that any portion of the offered stock not purchased by the other stockholders would then be offered to the corporation for purchase.

The corporation had a further period, I think again of ninety days, and I speak subject to correction, in which to purchase stock, the stock that was offered and not yet taken by the other stockholders, and only if neither of the existing stockholders nor the corporation purchased could the stock be sold to an outsider, and, further, it con- [2041] tained this agreement, which was attached to the minutes and made part of it, on the second page—third page from the last of Plaintiff's Exhibit 92 for identification—contained a formula which was to be applied in arriving at the value of the capital stock of the company in the event of any sale.

Do you have that before you, Doctor? A. Yes.

Q. And in substance it was that the sales price would be the value, the book value of the company, assets less liabilities, except that inventories of materials and merchandise were to be taken at 85 per cent of the book value.

Now, further keeping that in mind, if you will look at Plaintiff's Exhibit 91, you will see that in each of the years preceding the years of sale, and Hanover, the evidence is, was on an annual basis—the balance sheets were at the end of each year—that is, for the 1940 sales, if you look at the 1939 statement—there is set forth here the equity at the end of the preceding year, the adjustments for 15 per cent of inventory, and 15 per cent of supplies, an adjustment which appears in only the first three years for the reorganization expense, an adjustment [2042] which appears only in the year 1940 for prepaid rent, and to deduct current liabilit es in the year 1940, and also in the last four years there is deducted from the equity the $2½ million worth of preferred stock that were outstanding.

And you will notice in each instance the book value at the bottom is arrived at and the number of common shares of stock outstanding and the value per share, and it agrees in each instance with the prices which appear in the fourth column of Defendant's Exhibit 47, except that in the year 1940, when, according to Defendant's Exhibit 47, the stock was sold for $40, the book value was calculated on Plaintiff's Exhibit 91 for identification was $40.26. A. There is something wrong here.

The Court: 86 cents, isn't it?

The Witness: The years up there are incorrect.

Q. No, in each instance they are the year before the year in which the sale took place. A. So the $40.26 is really for the 1940, the $40.86, which represents 1940, is the sale price for 1941?

Q. That's right. [2043] A. Right, O.K.

Q. It was the preceding year's balance sheet, because I think the evidence in this case shows that Hanover balanced their books only at the end of the year, and had financial statements only at the end of the year, at least during this period. A. Yes.

Q. Now, Dr. Cyert, keeping in mind the information which is contained in Plaintiff's Exhibits 90, 91, and the substance of what I told you with respect to Plaintiff's Exhibit 92, in your opinion does the sixth column on Defendant's Exhibit 47 indicate the cost of capital to Hanover? A. No, not by a long shot. It is obvious in this case, I think from what I said, from what I have read, that what we have here are some prices which are artificial, which are not market prices, so by taking the earn-

ings per share over these particular prices, I don't know what you get.

It is obvious that you get something that is—it is obvious to me, at least, that you get something that's artificial because these prices are not market-determined prices. They are artificially determined prices made up for the purpose of selling [2044] within the group of stockholders as was read.

Take a look at 1948, for instance, the notion that you'd have a rate of earnings of 54.5 per cent would indicate that something is peculiar here. I want to make it clear that I am not an expert on the stock market, but I do follow it to a limited extent, and I don't know of any situations myself in which earnings of something like 54.5 per share.

In other words, you see, this is a—this is a peculiar situation. This is a company that is a very solid company, if you look at its balance sheet. It is a company that has a good earning record, it is a company that has plenty of current assets.

The idea that the price would be twice earnings is—I guess incomprehensible is the best word.

Now, the only way it does make sense is in the light of what we talked about, namely, that this is an artificial price, so that it does not represent market price. Therefore, it does not seem to me that this calculation, the calculation using earnings and price to get this rate of earnings is [2045] meaningful in terms of any kind of notion of cost of capital.

In 1948, the cost of capital to Hanover was not 54.5 per cent. If they wanted to get money they would not

have to pay 54.5 per cent to get it. If they wanted to raise it in the market, they would not have had to pay it. I am willing to say that categorically.

Q. Now, will you look at Table II, which is the third page of Defendant's Exhibit 47, and we have there in the third column a rate of return which is the percentage that the—well, the equity divided into the net profit after taxes to find a rate of return on the overall equity. A. Yes.

Q. With varying percentages and Dr. Corson testified that they averaged out or a weighted average—I have forgotten which he said now—to 14.1 per cent.

Now, in your opinion, is the rate of return as determined on Table II of Defendant's Exhibit 47 in evidence a measure of the market appraisal of the stock of Hanover or a measure of the cost of capital to Hanover? [2046]

A. No, this is a—this shows just what it says, namely, that it is the rate of return, namely, taking profits over equity. It does not have any relationship to stock prices, that is, 32.59 rate of return doesn't mean to say that the stock should sell for three times the earnings or something like this.

What it—this is a calculation. The calculation is what that is, is what is represented there. It doesn't again indicate the cost of capital in the sense that this is what the company would have to pay, any one of these figures; it is what the company would have to pay for additional increments of capital.

Let me try to elaborate on another point which has been bothering me in terms of the testimony here.

Let's take the 32.59 in 1947. It is a high rate. Now, one of the bothersome things here which I think should be

straightened out or at least there should be some discussion on at least this, that there is a tendency when one, for instance, takes a weighted average here and comes out, let's say, with 14.4 per cent, there is an assumption that is implicit that I don't think is valid or at least I'd like to have [2047] some evidence that it is before I would be willing to accept it, and that is that there are an unlimited number of investment opportunities in the company at this rate, that is, that the company can keep putting in money—investing money in its own company and get 14 per cent.

This is a confusion of what I would call an average and a marginal concept. It is the marginal concept that the economist is after when he is talking about cost of capital, namely, what is the incremental return, what is the incremental cost, that is, to get an additional amount of capital what will it cost you?

The idea that the company is such that you can keep putting in blocks of capital and getting that same return, you see, implicitly assumes that there is no diminishing returns to capital. It is—well, it is like the situation where—this isn't an exact analogy, but I think it makes the point—when we are trying to explain diminishing returns in an elementary economics class, we generally present it this way.

Suppose you have an acre of ground, a certain amount of seed and you have one farmer. You invest one farmer, in effect, and he gives you a rate of thirty bushels.

[2048] Now you invest another farmer. For a while you might actually get an increase. At some point when you keep adding farmers here you are going to begin to

get a decrease in your return, and this is what happens when you are investing capital in a company also. You don't just keep investing money and getting the same return with an unlimited amount of funds.

So that there is a point where the marginal return will differ from the average return, and there has been an implicit assumption all through the proceedings here, I feel, that the average—that this return is somehow constant, that there is no such thing as a falling marginal return.

Q. I have noted, Doctor, that on examining Table II the more money the company makes on its equity—let me put it this way. I will withdraw that.

Examination of Table II seems to suggest to me at least that the more money the company made on its equity, the higher its cost of capital, and the less it made, the lower its cost of capital.

Now, do you read the Table II in that fashion and, if so, what is your opinion concerning it? [2049] A. Well, I think that's—that's an accurate interpretation if one takes this sort of statistic notion, an average notion of cost of capital. What you are after, as indicated earlier, is an anticipation, anticipated earnings on equity capital, and that means that what has been true is only a piece of information, it doesn't follow that it is the determining factor, so that if earnings where high in 1947 it doesn't necessarily follow that one anticipates earnings that high in 1948, 1949 and 1950.

Obviously, if you had you made a grievous error, so what you try to do is to look for it. There is probably some explanation, for instance, as to why earnings were that high in 1947, which would lead you to feel on ex-

amination—I don't know what they are but I am assuming there must be something, because it is 1947, being 1948 were so much higher than all the others—you would make an analysis of those years and try to use them to get a better projection of future earnings.

Q. Now, you testified before, Doctor, that if a company had no market for its stock and if there were no comparable companies where you could obtain a market for your stock, you would throw up your hands [2050] at the impossibility of determining the cost of capital of the company from the company's own records; is that correct? A. Yes.

Q. In your opinion, can cost of capital of Hanover be determined—or the rate of cost of capital, or the percentage—call it what you will—be determined from Tables I and II of Defendant's Exhibit 47? A. I don't think so. I don't say one can't make a calculation. Obviously a calculation has been made. It is not a calculation—I am willing to say—with which you could get agreement among any group of economists.

Q. As its being representative of a cost of capital figure? A. Right, but this isn't only true of this one, let me point out. This is true in general of any calculation of a cost of capital.

There was a quote, for instance, if you had ten economists make a calculation, you get ten different answers. This is because you are trying to anticipate the future and there aren't any rigid rules by which this is done.

[2051] You see, the thing that I would like to get over is, through all these proceedings there has been a kind of impression that here is a rigid calculation. It is just not

this way. There are such mental factors that have to enter in, and this means that as you get different people, you would get different judgments being made.

Therefore, you would get different answers.

Now, I don't know if this is—If I am allowed to say this or not, but my own impression would be that there would not be many people who would have the courage of Dr. Corson in making a calculation with these data.

Again, it would depend upon how—I should qualify that to some extent—it depends on how rigidly you want to use the result. If you want to use the result as a very rough guide, O. K., go ahead and make it. But I would say you have to be very careful with something like—with these kind of data because you don't have good theoretical underpinnings for what you are doing when you are computing cost of capital from these kind of data.

Mr. Hayes: May we adjourn now, your Honor?

The Court: Yes.

(Adjourned to December 6, 1962, at 10:30 a.m.)

[2052] New York, December 6, 1962
10:30 o'clock a.m.

(Trial Resumed.)

RICHARD M. CYERT resumed.

The Court: Good morning.

Mr. Hayes: May we approach the bench, your Honor?

The Court: Yes.

(Discussion at the bench off the record.)

Direct examination continued by Mr. Hayes:

Q. Dr. Cyert, do you have before you the tabulations prepared by Dr. Corson, Defendant's Exhibits 48 through 52? A. Yes, I do.

Q. And the application of the so-called 14% cost of capital to the so-called cost of ownership and cost of leasing and the comparison of the two, so far as their so-called future values are concerned, are made on Defendant's Exhibits, I believe, 48, 51 and 52; is that correct? A. The actual comparison is, I believe, on 52.

[2053] Q. That's correct. Defendant's Exhibit 48, I believe, is the calculation of the so-called economic cost of leasing. A. Yes.

Q. And 51, the calculation of the so-called economic cost of ownership. A. Yes.

Q. You have examined those exhibits, have you not, Doctor, as well as the other exhibits prepared and submitted—put in evidence, rather, through Dr. Corson? A. Yes, I have.

Q. Have those exhibits, or do the calculations in those exhibits, and I am thinking particularly of the final one which contains the comparison, Exhibit 52, have any real meaning, any realistic meaning, in your opinion? A. Let me define what I would interpret by your phrase "realistic meaning," and then I will try to elaborate. I think what you mean is do these figures represent anything that would be reflected in a balance sheet and a profit and loss statement of a company.

Q. Correct. A. And the answer to that is no. What we have here is an analysis that I would classify as basically an analysis to determine whether or not a firm should

[2054] purchase machinery as opposed to leasing, given the assumption that it is required that the firm earn 14% —in other words, that it has a criterion that if it earns 14% or more it will invest. What is done here is a perfectly valid analysis, if you understand those qualifications and it is very competent, and while I am not prepared to vouch for the tax rates and so on that are earned, it is perfectly proper to make such an analyis after taxes.

What is done is the following. An analysis has been made of net cash outflow from the firm if you lease, net cash outflow from the firm if the firm purchases. Those dollars for the various years are difficult to compare. This is a slightly technical point but I think it is understood that a dollar in hand today is not of the same value to you today as the promise of a dollar one year from now. In other words, you can't compare the value of a dollar a year from now with a dollar today. The reason is that if you have a dollar today you can invest it and you will earn some money and, therefore, if one said, "Do I want a dollar today or a dollar a year from now?" obviously the dollar today is more valuable because I can invest it and earn interest.

What you have to do here is compare these [2055] dollars which represent outflow from the firm for a series of years; you have to find some way of comparing them, which means putting them on the same basis. This can be done very simply, either by discounting back to a particular year, say 1939, or taking all of the dollars forward to some other year, 1955. Dr. Corson selected the second method. So that each one of those dollars then is treated for each year—for each year each of those dollars is treated

as though then invested at a 14% interest and gained compound interest. Therefore, the final difference between them doesn't represent anything that, say, an accountant would take account of; what it does represent is that given the 14% requirement there is an excess of ownership costs over leasing costs.

To put it another way, and this is the way if I were doing such an analysis—I would say that what this shows is that you won't make 14% on your investment, assuming all the other figures are correct, for my purposes—assuming the tax rates are right and prices are right and so on. If we are just talking about an analysis to aid management in making a decision, the net result of that decision, given those requirements and given that you had the requirement of making 14%, on the investment, the answer then is, to management. "Don't [2056] invest."

It doesn't matter whether that excess is $900,000 or $5, technically—well, actually, if it were real close you'd probably say go ahead and invest, but it doesn't matter whether it is $10,000 or $900,000, the answer is, "Don't invest if you have to make 14% and if there are no other circumstances which would move you to invest."

Now, the interesting thing about this exhibit, I think, and the natural question—

[2057] Q. Are you referring to Defendant's Exhibit 52?

A. 52, yes.

Actually, to the whole analysis. And the natural question that management would raise if such an analysis were presented to it is, what would I make on my investment?

Well, it is relatively easy to go through such analysis and determine what the rate of return is, given these fig-

ures. Excuse me for talking so loud, it is the lecturing.

Now, it turns out—I think you can see this without going into detail—that the rate of interest which will equate those two streams, in other words, the rate of interest that makes the stream of outflow, cash outflow, from the company if you buy, equal to the stream of cash outflow, if you please, shows the rate of return that you would make on your investment if you purchased, and I went through an analysis whereby I applied a 10 per cent rate for future values and then 8 per cent, and then by a process known as interpolation, you can arrive at what the rate of return is.

It turns out the rate of return is something like 9.866 per cent.

Q. Is that taking the— [2058] A. Taking the—

Q. That would be the actual rate of return, assuming the same leasing charges, assuming the same costs. A. Same ownership costs and so on. In other words, now that would say that anyone who invested, given these figures, management—if I were presenting this, I would say: This is the return that you would make, 9.866 per cent.

Well, obviously these extra decimal points are sort of nonsense in this kind of analysis since these figures are rough.

Now, there are some interesting things about this kind of analysis and this is why this full area of making decisions on investment is inexact. For example, here I would like to point out that if one paid for these machines differently, the analysis would be different.

You see, if you notice on Exhibit 51, I believe it is, which is the one where the analysis of the—

Q. Of ownership? A. Of ownership—

Q. Defendant's Exhibit 51. [2059] A. Yes, Defendant's Exhibit 51. You notice that the assumption here is that the company pays out in 1939 $352,000.

Q. No, 356,000. A. Well, net, $352,000.

Q. That's right. A. Now, if in point of fact, let's say that the company made some arrangement whereby they paid for those machines over five years, let us say, then the analysis would be changed because now instead of $352,000 being compounded for the seventeen years, you would compound one-fifth of it there, then the figure 1940 would be larger, but the point is that this would make the compounding—this would change the next figure at the end.

I haven't made this analysis but my guess is what it would show or what it has to show is that the return would be higher. I don't know whether it would still make 14 per cent but it would be higher.

So that there are a variety of questions that a consultant or whoever is advising management, whether it is a controller or what, has to take up with management when the question of whether they should invest or not is to be made. You can't just [2060] present a tabulation, say, "You're through, boy. You can't make 14 per cent." There are many things you can go into.

Q. Now, you are acquainted with Hanover's financial condition from the exhibits in this case setting forth the balance sheets— A. Yes.

Q. —its working capital— A. Very familiar.

Q. —its cash balances, et cetera. From those do you see any need for Hanover to obtain new capital to buy $350,000 or even $550,000 worth of machinery in 1939? A.

Well, I don't. And I base that answer on the following and, as you raise it, this is an opinion, obviously you can't state a fact about this since you can't ever verify it:

It seems to me clear that first Hanover had a great deal of cash on hand. The company has what the economists call a high liquidity preference, it likes to have cash on hand. I talked to Mr. Sheppard a little bit about the philosophy just outside the class—the court—

Mr. Carson: Object to that.

[2061] The Court: Sustained.

A. O.K. Anyway, there are companies like this, you can find it in small companies as well as large companies. They prefer a lot of cash on hand.

It would seem to me that they could easily have financed this thing themselves by taking some of their own cash. Whether they would have had to pay for all the machines at once, I don't know, but it is clear the company did have the funds to make the purchase.

In addition, I would say they were in such a position again as a non-banker. My view is that they would have been able to borrow at a reasonably low interest rate.

Q. Would the effect of borrowing and repaying over a period of years be substantially the same as if they had deferred the investment over a period of years? A. Right. In other words, the way you would change this analysis would be you would modify the cash outflow—if they borrowed, you would modify the cash outflow each year to the amount they would be paying in the bank, and then you would also have to add in the interest costs they would be paying to [2062] the firm.

In other words, that would be you add for each year they paid interest, you would add that as an additional outflow of cash by the ownership method, and then you would spread out the total investment over the number of years that they would just be retaining the major loan. So it is difficult to say what the final calculation would bring in terms of a rate of return.

I think it is fairly clear that it would enable them to make more on their investment. I think the spreading out would be more beneficial to them than the increased small amount that we pay out from the interest charges.

Of course, the optimum thing for them would be to make an arrangement to buy the machines and pay for them over a period of time.

Q. You said if you made this calculation. What you are talking about there is if you made a calculation in accordance with the methods Dr. Corson used? A. Yes.

Q. Now, you will notice that on the top of Exhibit 48 the phrase "economic cost of leasing" is used. On Defendant's Exhibit 51, economic cost of ownership, [2063] and on Defendant's Exhibit 52 the comparison of both those so-called economic costs of ownership and leasing. A Yes.

Q. Would you comment on the use of the phrase in connection with these exhibits of economic cost? A. Yes.

Q. And I believe Dr. Corson testified that the final figure he arrived at, the $900,000 difference, was a true economic cost? A. Yes. Well, the notion of economic cost is a kind of—can be a misleading one. I think again in order to understand what these words mean, you have to have something more in the way of an example. What

the economist is trying to get at when he talks about economic cost—and I think probably some of the things that Dr. Corson said he did make this—he was correct in his definition of it—I think, however, there is some misleading implications of the way it was used.

Let me just try to make a simple example. First, a definition and an example. Basically, what the economist is talking about when he says "economic cost" is that a decision is taken which in some sense doesn't maximize something.

[2064] In other words, that a firm makes investment, let us say, and makes it in such a way that it doesn't earn as much as it could. Or let us say a man makes a career decision and doesn't make it in such a way as to maximize his income.

In this latter connection let us take a simple example of an academician. People always like to flatter academicians by telling them, "You could earn so much more money if you went into business." I never tried to take anyone up on this so I am not sure how true it is, but let's suppose it is true. Let's suppose a man makes a decision to become a professor, and let's suppose he is paid $10,000 a year. And let's say that someone offers him another job. At the time he makes that decision someone offers him another job at $20,000.

Then one could say the economic cost of his choice was $10,000, meaning that he didn't exploit to the full his opportunity, so that there is a $10,000 economic cost.

Now, you see, as far as he is concerned in terms of his life, in terms of how much money he spends, what he pays in terms of income taxes and so on, this difference

between $20,000 and $10,000 is nonexistent. [2065] To an economist evaluating his behavior, he would say there is an economic cost concerned with his decision, and if he were really going to try to be very rational, he would say, "What are the advantages that you are getting by being a professor; are they equal to the $10,000?" But let's ignore that for the moment.

Now, I might go on a little bit to something that is also related to this—

Q. Let me stop you on that illustration, if I may, Doctor.
A. Yes.

Q. Suppose five years after he decided to be a professor he discovered for the first time that there had been a conspiracy among the colleges and universities to limit the salaries to $10,000, and we were able to demonstrate that without that conspiracy he would have received $15,000.

Would you say, economically speaking, he had suffered no damage as a result of the conspiracy?

Mr. Carson: Objected to as to form and irrelevant.

The Court: Overruled.

A. Well, I think really the answer follows from [2066] my previous point that the difference between the $10,000 and $20,000 is irrelevant.

The critical point for this man is what is the difference between $15,000 and $10,000? Given his choice that he took his career, the facts that you describe would say that—would indicate that he could have, if the game had been played according to the rules that we have in this country—he would have earned $15,000. Therefore, the

effect of this conspiracy on him would have been to deprive him of $5,000 for those five years.

The fact that he didn't make the decision to go in and take the $20,000 is irrelevant for this purpose. It is relevant only to the economist who is evaluating his behavior under the conditions of something that he calls rational behavior. Rational always means maximizing or minimizing in economics.

Q. I interrupted you. You were going to say something else with respect to the economic cost, Doctor? A. Well, the major point that I wanted to emphasize was that it doesn't—economic cost isn't something that is reflected on on a profit and loss statement or balance sheet.

[2067] Further, the bothersome thing about $949,000 first is the fact that there isn't anything necessary that you compare this figure to, you see. What this says is that—well, the assumption is that if they had bought, if they had bought the machines, that they would have fallen short of the $949,000, but the $949,000, you see, is in a sense an artificial figure since it reflects the compounding over the seventeen years.

I could just as well have made an analysis or Dr. Corson or anyone else could have made an analysis which brought everything back to 1939. So then you would say the true economic cost would be $82,000, or some such number, whatever this turns out to be.

Again, this all is partially on the assumption of—

Q. You mean discounting it instead of trying to get future value? A. Yes, then it would make it smaller. So I don't know in this kind of game what one would say is the true economic cost.

The notion here is that it is attempted to be developed in these exhibits is that somehow the man [2068] should have earned 14 per cent. If he falls short of that, there is an economic cost. It is analogous to the difference between $10,000 and $20,000.

Q. Do these exhibits, Defendant's Exhibits 48, 51 and 52, demonstrate anything more than this, Doctor: That Hanover, if you compare the leasing of the machines by Hanover, and the purchase of the machines by Hanover—Hanover would not make 14 per cent on its investment in the machines as against investment in continuing to lease?

Mr. Carson: Objected to as leading and contrary to the evidence.

The Court: All right, sustained.

Mr. Hayes: May I inquire of your Honor which ground you sustained the objection?

The Court: Relative to leading. I think it has been demonstrated, but you can probably reframe your question. Ask him what it means.

Q. What do these exhibits, Defendant's Exhibits 48, 51 and 52, really show? A. They are designed—as I understand them, I am quite sure I do, they are designed to answer the question should management invest in these machines for whatever reason they have to make 14 per cent on [2069] their investment. The answer comes out to be no. And this is what they are designed to do. This is the only thing that they are designed to do.

Now, I might point out in terms of my understanding of the case that my statement isn't quite accurate because this does take up, I believe, only twenty machines and there are a total of thirty-eight, although I understand—

Q. Fifty-eight. A. Fifty-eight. Although I understand that the twenty that are taken up here account for something like 80 per cent of the value, so that the total decision might not be changed, but if I were going to prepare something like this for management, then I would certainly want to take up the total investment, and it is conceiveable that the other 20 per cent might modify that decision.

But again I have not tried to make this calculation and don't know.

Now, there is another point that I think is important here, too, to realize. This is of course an artificial—in point of fact this is not the way that in 1939 one could have presented this material, obviously. What we have done here now is [2070] to show how much in effect actually happened, at least actually happened by all of the—actually happened in the sense of how much leasing charges were paid out and how much was paid out in terms of—by the assumptions, how much would have been paid out in terms of ownership.

If you were doing this in 1939, you have to forecast this and it might well be—you see, it could well have turned out completely different in 1939 by making this kind of a forecast. The tendency—well, it would be just very difficult to forecast for seventeen years with any degree of accuracy. If you were sitting there in 1939. And I think this has to be borne in mind.

I guess also I would doubt whether—I would doubt whether anyone in Hanover would have been using 14 per cent in 1939. Well, I don't know. I guess this is just speculation, but it doesn't seem realistic to me to think

of a shoe company in 1939 ever thinking they were going to make as much on their investment as in point of fact they did periodically. You know these were not great times in 1939.

[2071] Q. As a matter of fact, Table II of Defendant's Exhibit 47 shows that what Hanover made in 1939 was 7.4% on investments, and in 1940, 7.94% on investments. A. Yes.

Q. You testified that—

> Mr. Carson: I think your figures are a little wrong, but the exhibit speaks for itself.
>
> Mr. Hayes: 7.47 and 7.94.
>
> Mr. Carson: That's right.
>
> Mr. Hayes: Isn't that what I said? I thought it was. That is what I meant to say.

Q. I think you testified yesterday that you are fully familiar with the Leidesdorf calculations and the approaches made. A. Yes.

Q. The final supposed excess of costs of ownership over costs of leasing, according to Defendant's Exhibit 52, is $950,000, speaking in round figures? A. Yes.

Q. What relation, if any, does that figure have to the difference between cost of leasing and cost of ownership, as demonstrated in the Leidesdorf calculations? A. There isn't any relationship between the two because they are designed for different purpose, as I [2072] understand both calculations. They are sort of perpendicular to each other. In the one case, in the Leidesdorf calculations, as I understand it—I think I do—this is an attempt to reconstruct the effects on the balance sheet and profit and

loss statement—I guess primarily the profit and loss statement. This is an attempt to look at what would have happened, assuming that the machines had been purchased, you see. In the Leidesdorf calculation the basic assumption has to be that the machines were purchased. In this calculation, the defendant's calculation, the objective is to determine whether the company should purchase, given that it has to make 14% on its investment. Given those assumptions, the answer is no.

In the Leidesdorf calculations, what you are doing is going through on a year-by-year basis and saying, "What would have happened basically to the cash to this company if it had been allowed to purchase?" but the basic assumption has to be purchase. The basic assumption is that the machines were purchased, otherwise it makes no sense; whereas in this one you are looking at the situation of should they have purchased, given that they had to make 14% on their investment.

I think it is important to understand those [2073] two—the objective of the calculations. The $949,000 in the defendant's calculation does not represent items on the balance sheet.

Q. Or the profit and loss statement? A. Yes. It is this $10,000 that is the difference between what the professor gets when he takes his job versus what he might have gotten if he had gone into industry.

Q. By the same token, the Leidesdorf calculation is the difference between what he got at $10,000 and what he would have gotten if there were not a conspiracy among the colleges and he would have gotten $15,000? A. I think you can make that analogy. In other words, that is the $5,000 part.

Q. Is there anything else you have to add to what you have already given in your testimony yesterday afternoon and today with respect to the first two criticisms that Dr. Corson leveled at the Leidesdorf calculations, to wit, the failure to use what he called "cost of capital" and, two, the failure to find the future value, or have you covered that so far? A. I would like to summarize those so that there isn't any confusion on where I stand versus where he [2074] stands, and maybe this is repetitive and if so I apologize.

The calculation that he used is perfectly proper as an aid to decision-making. I would give him an A if he were in my class for it although I guess I would have to check the tax rates, but it is not clear at all that because one does those things, that is, introduces taxes, introduces the notion of future value or present worth as discounting—it is not clear that you want to use those same techniques if what you are trying to do is to reconstruct what would have happened to the profit and loss statement. The latter one, the latter problem, is a different problem, and one has to approach that, I believe, differently.

Q. Would you say that— A. There are different considerations that have to go into that.

Q. Would you say that because of what you just testified to the calculations on Defendant's Exhibits 48, 51 and 52 just have no relation to the Leidesdorf calculations at all?

Mr. Carson: Object to the form.

The Court: I think it has been answered before. I will overrule that.

[2075] You object because it is leading?

Mr. Carson: Yes, sir. He is putting words in the witness's mouth in the clearest way and we need the witness's opinion.

The Court: I will sustain the objection.

Ask the question directly, if you will.

Q. What, in your opinion, Doctor, is the relation, if any, between the Leidesdorf calculations, which you say attempt to forecast what the effect on the profit and loss statement would be, and the $949,000 on Defendant's Exhibit 52, which you say shows in effect that Hanover, if it made the investment, would fail to make 14% by that amount? A. The basic relationship between them is really one that I have said: they are computed for different purposes and therefore they have—the figures don't relate to each other. The only logical relationship to them, as I understand the case, is that somehow the calculations of Dr. Corson are to prove that the defendant wouldn't have made the decision to purchase the machines. This is my understanding of it.

Q. You mean the plaintiff wouldn't have made the decision? A. The plaintiff. I am sorry.

[2076] Q. Let me direct your attention to the third criticism that Dr. Corson leveled at the Leidesdorf calculation, and that was the failure to consider taxes.

You recall that testimony, do you not, Doctor? A. Yes.

Q. Will you comment on that criticism of Dr. Corson's. A. My position there would be similar to the one that we have already had to the other comments, that I would heartily endorse the notion of introducing taxes on making a decision on preparing data for management to make a decision as to whether they should purchase or not. This

is a perfectly proper thing. The question of whether one should introduce tax considerations or not when one gets into the question of reconstructing the balance sheet seems to me to be much more nebulous; it doesn't seem to me that it follows, but you would use it in the decision-making situation; you would also want to use it in attempting to reconstruct the effects of purchasing. I guess I just can't agree with him that this is a criticism, at least not without a great deal more elaboration on his part.

In other words, I don't see his point at this juncture as to why one has to introduce tax considerations [2077] when you are attempting to reconstruct the facts in the profit and loss statement from a decision to purchase. It is perfectly true that in making the decision I think everyone will agree that after-tax calculations are the ones. You want to look at this. If you are going to invest, look at the after-tax situation, but in the other problem it is not at all clear.

Q. Would you have any opinion, as an economist, on a question as to whether or not taxes should be deducted in the Leidesdorf calculations if used for the purpose of calculting damages in this action? A. I would see that as a legal question primarily. I don't think that I am competent to judge the law on that. However, there is one point—everyone likes to be a lawyer, I guess, just as everyone likes to be an economist, and I have thought about this a little bit—from one point, that is analogous to a situation that exists in the question of taxing dividends: there is a notion of double taxation that comes out of public finance, you know, where the corporation is taxed on its income and then pays out dividends and the

individual is taxed and for many years there has been a controversy about double taxation.

It strikes me in this case, and this is [2078] bothersome and I don't know the final answer, and I think it is a legal question—if you compute the so-called damages after taxes and then the plaintiff—suppose the plaintiff were awarded some, then he is taxed on those and it strikes me you have again the equivalent of double taxation, but as far as I have gone—

Q. Let me shift to the last criticism that Dr. Corson leveled at the Leidesdorf calculations, and that was the use of the consumer all-items price index, which is set forth in Plaintiff's Exhibit 40, and in that connection he testified that because of the fact that it reflects consumer goods—

The Court: May I interrupt a moment, Mr. Hayes.

Off the record.

(Discussion off the record.)

The Court: We will take a short recess.

(A short recess.)

By Mr. Hayes:

Q. Doctor, we were about to start on Dr. Corson's criticism of the use by Leidesdorf of the BLS, consumer index, all items, and you recall his testimony? A. Yes.

[2079] Q. That it was improper, it measured the changes of price in the market-basket approach, so to speak. A. Yes.

Q. And you are acquainted, of course, with the consumer price index, all items? A. Yes.

Q. And I believe Dr. Corson testified that he knew of no specific index that would be applicable in this situation. Do you agree with that? A. By its very nature it can't be because the prices that you want to measure didn't exist in 1939, since the machinery couldn't be sold.

Q. Doctor, Corson also said that the proper way was to use a leasing cost, as an index arrived at from the lease-cost, what he called the lease-cost method, which appears in Defendant's Exhibit 81 in evidence, which I think I have before you.

Do you have that before you? A. It is marked 78 here.

Q. It has become since then Defendant's Exhibit 81. A. Yes, I see that.

Q. I show you Plaintiff's Exhibit 77 in evidence, [2080] which I believe you will recall Dr. Corson testified were the sale prices he arrived at by using the leasing-cost method worked out in Defendant's Exhibit 81. Do you recall that? A. Yes, I do.

Q. Now you have before you Defendant's Exhibit 78 in evidence. I notice on Defendant's Exhibit 78 in evidence the computed net costs of ownership, as they appear in the Leidesdorf calculations amount to $454,000. A. That's right.

Q. Speaking in rough figures. A. Yes, for the first 20 machines, I believe.

Q. That's right. The computed net costs of ownership determined by Dr. Corson's leasing cost index would amount to $384,000. A. Rounded off, that's right.

Q. Or a difference, roughly, of $71,000; is that correct? A. That's right.

Q. If, Dr. Cyert, the Leidesdorf calculations had used the cost of ownership arrived at by Dr. Corson in Defendant's Exhibit 78, under the leasing-cost index as against the cost of machines, assuming they could [2081] be bought, derived from the use of the BLS index, what would the effect have been on the Leidesdorf calculations? A. Well, it is pretty clear what the effect would have been; it would have been to increase the damages as shown on the Leidesdorf calculation. I can illustrate that—

Q. By the difference I mentioned of $71,000? A. Yes. We should have a blackboard here. If you think of leasing changes as represented up here (indicating), the Leidesdorf calculation essentially is to take from those leasing charges the cost of ownership, so that the higher the cost of ownership, the lower the damage, because they are taking that difference and the lower the cost of the machinery, the greater the difference. The difference is the amount between my hands. You raise cost of ownership and decrease damages, and as you lower cost of ownership, you increase damages.

I probably shouldn't go into this but just let me point out that it is sufficient just to look at the final figure there because there is a linear sort of combination and the fact that you come out with $383,000 for net ownership, even though you start out with $443,000, [2082] you would still end up, under the Leidesdorf calculations, Dr. Corson's leasing-cost index, with higher damages of approximately $71,000.

Q. What is your opinion, Doctor, about the propriety of using the consumer all-items price index as was used in the Leidesdorf calculations? A. Let me say this. Dr.

Corson's testimony on the index was quite accurate; it is an index designed to measure the cost of living for a particular group. This particular group turns out, of course, to be a large segment of our society and I think it is quite accurate to state that there isn't any one index which is the universal measure of everything that happens in the economy—the economy is complex, too many dimensions. It is clear to me, however, that the general trend of prices—in other words, the economist talks about the price level, and I think it is reasonable to say that the consumer price index is a reasonable indicator of the general price level, remembering that there is no one best measure of the general price level. This is a reasonable measure of the general price level.

Q. When you were first consulted by my firm, Doctor, you were shown the Leidesdorf reports, if I recall correctly, and you were told about the use of the [2083] BLS and were you also shown what is now Plaintiff's Exhibit 61? A. Yes. Let me elaborate on that a moment. My notion is a situation like this is that what you are doing is trying to reconstruct a situation that of course did not exist. If it existed, we wouldn't be here. What you are trying to do is equivalent to an estimation problem, and let me point out that we live by estimation. There are estimations all through our society, all through the business world. We have to do this. What we are trying to do is to estimate some effects of a situation. In other words, we are saying if they had been allowed to purchase and had purchased, what would happen. I don't think there is any question but that we are estimating.

My initial reaction on this was to say that the BLS consumer price index is reasonable for the reasons I just

stated; it is a reasonable measure—a reasonable measure, not the only measure—of the general price level. My reaction in this, as in other problems that I have been involved in with estimations, is to get some other measures and let's see whether all these measures are in the same ball park. What you are trying to do and what I feel needs to be done is that [2084] you have to get checks on yourself because you are estimating and there isn't any scientific way which is the right way of doing this.

My approach is, "Let's get some other things." I immediately said to Mr. Morton, when he explained this to me, "O.K. I think that is reasonable. Is there any other way that we can estimate this that would give us further evidence as to whether we are in the right ball park, whether we are getting things in the right magnitude?"

At that point he explained to me—it was the first time I understood this—I had not been so intimate with the case that I realized that United had actually sold some machines, so I asked him what else they had. He produced the optional machinery index.

Q. That is Plaintiff's Exhibit 61? A. This is represented by Plaintiff's Exhibit 61. It struck me as a reasonable kind of check. In other words, again not the only check but another reasonable check. This is what I was after.

Q. After further thought, did you have a further suggestion to make? A. Let me just point out that I felt, if you look at these figures—

[2085] Q. On Plaintiff's Exhibit 61? A. On Plaintiff's Exhibit 61. I feel that I am justified in saying that these do give me at least enough additional evidence to have

some confidence in the results of using the consumer price index; they are in the ball park and in general the consumer price index is conservative in relation to these in the sense that they reduce the damages of Hanover. In other words, obviously you couldn't use any one of these, but in general these would tend to give you still lower machinery costs and if you remember my notion, the lower the machinery costs, the greater the damages, so that I felt reasonably justified on that kind of calculation—"justified" is not the word; I felt reassured.

Then again the approach in all these things is to try to get as many checks as you can. It was not the same day, but I think it was somewhat later, when I got back to thinking about the case, and I suggested another way of looking at this would be to say take the relationship in 1955, when they finally did sell machines and established prices, and see what relationship that bore to the leasing charges—I didn't know about royalties at that point—and then see how that ratio would compare [2085a] with things in 1939, when Dr. Corson came up with this leasing index, and I guess my stock rose with the law firm.

[2086] Q. Was the first time you saw Defendant's Exhibit 81 and Plaintiff's Exhibit 77 at my office sometime Tuesday afternoon or Tuesday night? A. That is right.

Q. And prior to that time had you available to you the unit charges and monthly rentals on the machines that Dr. Corson used for the year 1939? A. No.

Q. And on Tuesday night did you in collaboration with Mr. Cayo have our firm work out a lease cost price index? A. That is correct.

Mr. Hayes: Will you mark that for identification, please.

(Plaintiff's Exhibit 93 marked for identification.)

Q. I show you Plaintiff's Exhibit 93 for identification, the first page of which is headed "Sale Prices determined by the lease cost method" and the second page is the method of calculation.

Now will you explain briefly to the Court just how the statements in Plaintiff's Exhibit 93 for identification were prepared? A. Yes. Could I ask for those rough calcula [2087] tions? I think, Ron, that I could use some examples there that would help make the explanation easier.

(Document handed to witness.)

A. (Continuing) Let's take machine No. 1, for example, The first thing that was done was to take the rents and royalties that had been paid by Hanover for the machine in 1939, to double these so that you had them for the whole year of 1939, since the actual calculations were only for six months. In this case, these were something—for machine No. 1 there was something like $7,000.

Now, then, there were nineteen machines of type No. 1. By dividing the nineteen into roughly the $14,000—double the royalties which were roughly $7,000—rents and royalties—this gave you $14,000, dividing by the nineteen, which gave you a total of $767.04, which were the calculations—which was the average rent and royalties per machine paid by Hanover to United.

Now, then by taking the unit charge first, .045, dividing that into the 767, you would get the amount of production.

Did I go too fast now or is that clear? In other words,

what you are after here—let me put it [2088] this way—what you are trying to do is to deduce from the rents and royalties and the number of machines you have what the production was. The production turns out in this case to be 17,000 stitches.

Q. For that machine? A. For that machine.

Mr. Carson: Excuse me, which machine is this?

The Witness: This is machine No. 1. Would you like me to go over the figures?

Mr. Carson: That's all right.

A. (Continuing) Then in 1955—

Q. Is there a rental charge added, if there was a rental charge applicable in 1939? A. There isn't in this particular case. You wouldn't want to add it, you see. If I find one with a—well—

Q. I think No. 10 had a rental charge. A. Well, actually there turns out to be a rental charge on this one in 1955, so I can explain it.

Q. Yes, but if there were a rental charge applicable in 1939, that would be added also? A. First you want to deduct it before determining the production.

Q. That's right. [2089] A. You deduct it in order to determine what the production was and then you would get it back in.

I can go through that very nicely with 1955 value.

So what this says is that production in 1939, as inferred from these charges, deduced from these charges, is 17,045. Now, then, if you look at the 1955 prices, they turn out—you have a unit charge there of 3 cents, so you multiply the 3 cents times the 17,045, which gives you a production

in 1939, see. This is what we are holding constant. In any index you have to hold something constant. Here it turns out to be the production in 1939, which in my view is the thing that you want to hold constant.

The 3 cents times 17 gives you something like 51135.

Now, in this case you would add the rental charges which turn out to be $20 a month, you add in for twelve months, it gives you $240. So that says in 1955, for machine No. 1, you paid a total of $751.35.

Now, in 1939 per machine we paid a total of $767, so by comparing the 767 to the 751, you get a figure of something like 102 per cent.

That means that if you take that 102 per cent [2090] and multiply it times the price of machine No. 1 in 1955, you will get the price that should have existed in 1939. In other words, you will get an estimate of the price in 1939.

We really should have a blackboard. In other words, what you are doing here is taking the amount paid in 1939 over the amount paid in 1955. You have got that on one side of your equation. That should equal the price in 1939, which is an unknown, divided by the price in 1955, which is known.

So then if you think back to your algebra, what you are doing is taking—you are multiplying both sides by the denominator and it cancels out on the righthand side, and multiplies this ratio, which is 102, so the 102 is multiplied by the 1939 price and that 1955 price and that gives an estimate of the '39 price. It is an approach known in statistics as a ratio estimate.

Q. All right, now, going back to Plaintiff's Exhibit 93, to the first page of it, if you would, does that first page set forth for twenty machines the 1955 sales prices which

were actual, and the 1939 sales prices as calculated in the method you have just described? [2091] A. That is right. That is exactly how we got those.

So if you multiply—we can now do a little further verification. If you multiplied $5,950 by 2.1, you would get 2,074, unless the machine broke down on this.

Q. And then you have totals and a calculation on the bottom. What is the reason for that? A. You see what you are after here is not what is the price index with respect to machine No. 1 or machine No. 2, what you are after is some kind of combined index, so you have to find some way of relating 1955 prices to 1939 prices.

Q. Is one reason for what you just said the fact that the data are available for only twenty machines and you have fifty-eight machines about which you are concerned that you want an overall index, is that correct? [2092] A. Well, that is only partly it. In general you are after an overall index because the consumer price index is an overall index. I wanted something that would give me a further notion of whether or not the consumer price index was in the right ball park, and I had the optional one, and now I want a further one. If I could have thought of a third one, I would have taxed your firm to try to find the figures and come up with it. I haven't been able to come up with another one.

So that given that we have these things, I wanted these put into a single figure.

Now, by adding up these prices, by adding these 1955 prices up, and by adding the 1939 prices up, making the comparison, then what you get is an index of these machines by the lease-cost method. The reason for adding

all these together is that this is essentially what the statistician would call a self-weighting method. In other words, the more experience I have, the machines will count more, which is what you want, and so by comparing the total value of these twenty machines in 1939 prices, with the total value of these machines in 1955 prices, you get a gain, given the correctness of our arithmetic—you get an index of 52.9, which almost [2093] looks like a put-up job, because it turns out the consumer price index is 51.9, if my recollection is correct, in 1939.

Q. And would you describe that 52.9 as a weighted average? A. Yes, it is self-weighted in this one.

Q. I assumed so but I did not think you said so. A. Yes. There are also other ways of weighting, presumably. There are many ways of weighting indexes as there are statisticians, but this is sound by my way, and we decided on the method before we knew the answer. So far as I know, unless Mr. Cayo did some work behind the scenes, this is the only method we tried.

Q. Isn't it a fact that you suggested the method before you heard Dr. Corson testify but we didn't have the data available? A. Precisely.

Mr. Hayes: I offer in evidence Plaintiff's Exhibit 93 for identification.

Mr. Carson: Objected to as irrelevant and without foundation. I think the testimony shows that the index, so-called, is constructed on constructed figures, not on real figures. That is, the witness has explained, using the second page of Exhibit 93 for [2094] identification, as a description of the method, that the 1939 calculated sale prices are

themselves constructs which he is employing for the purpose of delivering the ratio of 25.9%

Now what Dr. Corson did was to establish a ratio between real figures, that is, the ratio of the 1955 sale prices, and lease terms which existed, and which when established was then applied by him to derive an index applicable backwards to the really existing 1939 to 1954 lease terms.

Mr. Hayes: Exactly—

The Witness: Could I?

Mr. Hayes: Pardon me. Just a second.

Mr. Carson: I may have misunderstood the testimony.

Mr. Hayes: He took the actual production, he took the actual rents and royalties paid, he took the actual rates which for 1939 we did not learn until we got Dr. Corson's testimony.

The Court: Yes, as I understand the testimony, while it is a 1939 calculated sales price, it is a sales price calculated from real figures; isn't that right?

The Witness: Yes, that's exactly right. Let me put it another way. Maybe this would make it [2095] clearer. What we could have done, which would have been another way of doing it, would have been to add up all of the royalty charges as computed here in 1939, all of the royalty charges in 1955, and get that ratio, then multiply all of the '39 sales prices by that ratio.

Q. But you would be using actual figures? A. Yes, you would be using actual figures. It is constructed in the

sense that an index is constructed. You are deriving the index, you are measuring the index.

Mr. Carson: I have no objection to constructing an index for real figures.

The Court: I think that is what he has done.

Objection overruled. We will admit 93 in evidence.

(Received in evidence as Plaintiff's Exhibit 93.)

Mr. Hayes: I have no further questions of Dr. Cyert at this time.

* * * * *

[2178] Q. Going back to our original question, didn't you understand when you testified on Mr. Hayes's examination that Dr. Corson's documents, exhibits, which you were testifying about, proceeded on the basis of the Leidesdorf computations? A. Sure.

Q. And that they attempted to add three factors, cost of capital, taxes and future worth, to the figures in the Leidesdorf computations on the basis of the Leidesdorf assumptions? You knew that, didn't you? A. Well, you see—

Q. Can't you answer that yes or no, or have I stated it wrong? A. You have stated it in an ambiguous fashion because I think there may have been some misunderstanding. You can't just sort of add some concepts to that. In the process of his work, when he did—he may have thought he was just adding something to them. In the process of his working, what he did was to produce a document that is basically the document as I have described it, namely, it is the kind of thing that

one would present to [2179] management to decide whether or not to buy or to lease. He is not adding something there that has the same purpose as the Leidesdorf calculations.

Q. Is it your point that the Leidesdorf calculations were not documents which would be presented to management in order to decide whether to buy or to lease? A. Oh, definitely not.

Q. Definitely not? A. Yes. They are already on the assumption that the machine was purchased. That is the point. They are an attempt to reconstruct the balance sheet and the profit and loss statement along the lines of what would happen given that the company had bought the machines. That is their purpose.

• • • • •

[2186] Q. Let's go to the sale of stock; did you say that had nothing to do with the matter during this particular period? A. Those particular sales of stock had nothing to do with whether or not you were going to make the investment. In other words, the sales of stock had nothing to—knowing what stock sold for, or let's say knowing what stock was sold certainly wouldn't help you, particularly in making the decision in 1939, nor would you have to forecast that.

• • • • •

[2189] Q. Going back to my question, are you familiar with an article of which I show you a reprint of Joel Dean called the "Present Cost of Investing in a Company's Future"? Reprinted from "Planning Ahead for Profits" by American Management Association, 1958? A. No, I generally don't read—see their publications. I suspect he said

something that is very similar to something I have read, so I am willing to comment on it.

Q. Let me read you a passage from page 90 and see if you would agree with it:

> "Estimating a company's market cost of [2190] capital is a complicated task concerning which there is wide disagreement even among professionals."

You would agree with that, wouldn't you? A. I have so stated.

* * * * *

[2205] A. Let me read this phrase from Dean, from page 576. This is the book, Managerial Economics.

> "Any estimate of the cost of equity capital based on statistical analysis thus relies on broad assumptions of the relevance of measurable current and historical data to market expectations."

In other words, this is, as I said, if I were going to make a projection to the future as to what the cost of capital will be, then I certainly would rely on some current data and some immediate past data like, for instance, gross trends and so on.

[2206] But what I have been saying—and this is where we are not getting together—to go over a company's past record and try to make the statement that is what its cost of capital was is misleading in the sense that if they had taken different actions in 1939, had been able to take different actions in 1939, then the cost of capital would have been different.

Or, in other words, to go back over the record when they didn't invest and measure cost of capital and then say

that is what the cost of capital is, if they had invested, is completely false.

* * * * *

[2209] Q. Well, apart from your personal experience. I meant to your knowledge as a scholar in the field of economics. A. Let me be very frank with you now. The only use that I have ever seen in practice of this has been in the shoe machinery case, that is, the calculations that Dean and Anthony tried to do for a different purpose. I do not, of my own knowledge, know of a corporation that is doing this. I know that Dean has argued that he has been able to calculate it, and you have read something about it. I know the theoretical literature on the subject and as I have read before, this is certainly something that people are trying to introduce into capital budgeting decisions.

Q. People are trying to introduce it into capital budgeting decisions? A. Yes. The difficulty is that nobody agrees on how it can be measured.

* * * * *

[2261] Q. Is it your opinion as expressed here that the cost of capital in no way and at no time entered into the accounting records of the corporation? A. Yes, I would say that.

Q. By accounting records you mean the annual balance sheet and profit and loss statement? A. Yes.

Q. Well, would you assume that a shoe manufacturer has a cost of capital, much of it derived from debt and preferred stock of between 12% and 15% and that he invests $1 million in a new plant on which his return is between 6% and 7½%; please further assume that the life

of the building exceeds 25 years. Would this investment be reflected in a lower ratio as between annual average net income before taxes on the successive profit and loss statements? A. Well, the answer to that is obvious, that you don't know.

Q. It wouldn't? A. No. What are business conditions like? It may well be that business conditions are such if you are in a rising market that this thing turns out to be extremely profitable.

Q. I asked you to assume only what I stated in [2262] the question, nothing else. A. I can't answer it without some assumption about business conditions.

Q. Let's assume that business conditions remain unchanged. A. That the company has previously been earning 12% to 15%?

Q. Which I called in my question cost of capital. A. Yes, and now they invest some money from the company's funds?

Q. Yes. A. They make 6%?

Q. 6% to 7½%. A. And these funds had previously been unused?

Q. Yes. A. Then they would show on their accounting records a greater profit.

Q. You say they would show on their accounting records a great profit even though the money cost them on my assumption between 12% and 15%? A. You see, that's—yes, that's exactly right. What I said is exactly right.

Q. If you assumed that they had to raise the money from debt or sale of stock, would your answer be different? [2263] A. Well, you have to take them separately. If you assume that they raised the money by a sale of stock,

then what you've got is more equity capital, which has been raised—and let's assume that your 12% and 15% holds, which means that the stock presumably is selling at something like seven or eight times earnings, what would be reflected in the company—let's take that case—is higher profits, but a lower rate of earnings on your equity capital, which presumably would be reflected eventually, again depending on stock market conditions, could well be reflected in a low price of the stock.

If you take the debt, if you assume that they raise the funds from debt, and whatever interest rate you want to use, assuming that it is less than the 6% that you are talking about, then they would show up with higher profits and a higher earnings to equity ratio than before. The effect on stock prices would be difficult to predict because of the effect of the increased debt in the way of market, but in terms of the straight bookkeeping aspects and accounting aspects, you would find higher profits than before because you now have in there capital which has not been in before on which you are earning more than you are paying.

[2264] Q. Of course we have a lot of different assumptions, and I don't want to go over them again, but isn't it a fact that depending on what assumption you would use, you would reflect a change in ratio as between the annual income before taxes on the profit and loss statements and the stockholders' equity on the successive balance sheet? A. The ratio between profits and stockholders' equity?

Q. Yes. A. That would change; in two of the cases it would go up and in one it would go down.

Q. That would change and your deviation, whichever way it would be from the cost of capital would get into

the accounting of the corporation, wouldn't it? A. Of course not. You don't have—in the accounting you don't have the earnings to stock price ratio.

Q. Haven't you just answered now as to the effect on the successive profit and loss statements and balance sheets? That is the accounting of the corporation, isn't it? A. Yes, the profit would get in. The profit that is made on the investment would get in. I have said [2265] in both cases, in all three cases the profits would be greater.

Q. In all these cases they would be greater? A. Of course they would. You are getting new capital into the firm and you are earning some money on it.

Q. Regardless of the fact that on one of the assumptions the rate of return of 12% to 15% was not received from the investment? A. Yes, because you see you are not paying out that money. You are selling some stock and you are getting that stock back, the money from that stock back, and investing it. Previously that money wasn't there. Now the effect that shows up is the one that I mentioned, namely, that the ratio between earnings and stockholders' equity will go down from where it was. That will lower that, but that's that part of the accounting records. That is not something by which you compute profit and loss.

Q. That ratio is reflected in the balance sheets and in the profit and loss statements, isn't it? A. Let us say you can compute it from data that would frequently be submitted, yes.

Q. Can you compute it from anything else? You [2266] have to compute it from those statements, don't you? A. By "it" you mean—

Q. Ratio. A. The ratio of earnings to stockholders' equity?

Q. Yes. A. You presumably can get this—can get the total investment, I suppose, from other sources. I suppose you can get a total investment from a prospectus, for instance. I don't know what you are after there. It is possible for you to get earnings and just the earnings, and it would be possible for us to get the stockholders' equity from a variety of sources.

Q. Your answer then is that even on none of these assumptions does the cost of capital enter into the accounting records of the corporation; is that your answer? A. That's right.

Q. On none of these assumptions would the book value per share as derived from the balance sheet be affected? A. The book value per share? Presumably on all of these methods the book value per share is going to be affected. You have made an investment and therefore your book value has changed.

[2267] Q. And you don't consider that that fact affects your answer about the use of the cost of capital affecting the accounting records of the corporation?

Do you understand my question? A. Let me just think about it a minute.

The fact that book value changes, does that mean that I don't consider cost of capital affecting the records? I guess the answer to that has to be no, I don't.

* * * * *

[2268] Q. Now, you base part of your testimony upon the assumptions I think were given to you by Mr. Hayes as to a restrictive agreement among the stockholders, did you?

A. I would say that and the fact that these were sales to stockholders and employees and the fact that this is not a stock that is sold publicly, at least during this period it wasn't. There was no market for it.

Q. There was no public market at all for this stock in 1939 to '55, was there? A. That's right.

[2269] Q. Is it your testimony that in the absence of a public market for the common stock you could not use the sales made as shown on D47 as an indication of the cost of capital? A. That's right.

Q. Now you recognize, do you not, that the prices fixed on the sales are prices fixed by the board of directors of Hanover? A. That's right.

Q. And that they represent the figures which the controlling stockholders sitting on the board were willing to sell shares for and which the purchasers were willing to buy them for? A. That's right.

Q. Isn't this under the concept of economic concept of cost of capital, even if not the most satisfactory indication, an indication which you are to take into account in determining Hanover's cost of capital?

Mr. Hayes: May I have the question, please.

(Question read.)

A. The answer is no, because those prices obviously do not represent a price arrived at by the market, and this is what you are after when you are trying in compute cost of capital. These were prices [2270] for stock in which the purchaser was being given a benefit, the company was trying to keep key employees happy, and it was

trying to make its major—give its major stockholders additional benefit.

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[2277] Q. You again say you cannot use a rate of return in assessing the situation backward when you have to make a determination over the past sixteen years? Is that what you are saying? A. Not quite. Let's put it this way: If I were going to compute the cost of capital for 1945 I would certainly want to take account of what the trends were showing from 1944 and 1943 and some years back. This is one of the facts you take.

If I wanted to compute it for 1939, I would want to know what was happening before then. You are always, when you are talking about cost of capital in this sense, talking about prospective stockholders. You are trying to say, "What rate of return on my stock prices do I have to have to get new capital into the market?"

A couple of those definitions I read yesterday, one from Dean and one from Harlan, Christianson, where they talk about prospective earnings per share.

Q. You are saying when estimation has been concluded and the facts have been determined by the past record, the facts of rate of return as so determined cannot be used for the cost of capital during [2278] that period under the concept as you understand it? A. You couldn't just average these and say this is the cost of capital.

Q. I said "used." A. In the way I have indicated, if you are going forward, those in the immediate preceding period, as Dean spells out quite clearly, and possibly Anthony—I don't recall—would indicate. You are trying to use the past data to indicate what the future is going to be like.

Q. Are you deliberately escaping my question? A. I am trying not to. There is no need for me to.

Q. Well, thank you very much. Since there is no need, will you address yourself to the question, which I will state again—

Mr. Hayes: May we have it read?

(Question read.)

A. Well, that is obvious, yes.

Q. What is obvious? A. It is obvious that you can't, as I said, just average some rates of return for a period and say that is the cost of capital for that period.

Q. I used the word "used." [2279] A. That is what I was trying to do when I said you would use certain of these in helping you to project. Now, let's not play games.

Q. Let's not please both play games, either of us. A. O. K.

Q. I will avoid playing games if you will. A. I am trying to.

Q. Will you address yourself to my question as to whether this tabulation of rates of return can be used at all, and I don't say exclusively— A. It can be used—

Q. Wait a minute. In 1955 for determining the cost of capital in the prior period, by which I mean not prospectively, in connection with your agreement with Dr. Dean, that rate of return is that which is necessary to attract stockholders and so on.

I understand you to say it can't be done properly? A. I would like to make a little—just a short answer, if I could. I am saying that you can't average backwards and

say that was the cost of capital for that period. You can use the data to help you to project for the future. Isn't that a clear answer?

* * * * * *

[2284] Q. Would you say the same as to disposal values of machinery disposed of in the 16-year period, that that could be taken reasonably into account in comparing cost of ownership with cost of leasing, even though the dispositions had already occurred? A. Let's make sure we mean the same thing by "disposals." You mean the selling of machinery before its life—

Q. What Leidesdorf calls the disposals, in its computations. A. This is the selling of machinery presumably before its useful life is completed.

Q. As a matter of fact, it wasn't selling, under the facts, but this record shows it was the return of leased machines. That is something that happened in the past and is called in the Leidesdorf computation a disposal. [2285] A. That is not right.

Q. What is not right? A. Your definition of disposal. What is meant by disposal is the actual selling of a machine, I believe—that is, the equivalent of selling a machine. You are getting rid of the machine and getting your capital back.

On the return of leased machines, that was not taken account of in the Leidesdorf calculations because they were biased in favor of United Shoe in that respect.

Q. You have been told that that treatment was a bias in favor of United Shoe? A. Look, what I just said was —you were busy over there—

Q. I think I heard you correctly. A. What I said was, returns of leased machines—for example, suppose orig-

inally there were nineteen machines in 1939. If in the process of the years two were returned, this was treated still as though Hanover had nineteen machines. Those returns of that type were not treated as disposals.

Now, that treatment biases the results in favor of United Shoe. In other words, it reduces the [2286] damages, as they calculate them.

Q. Excuse me— A. It raises the cost of ownership.

Q. Where does Leidesdorf calculate the damages in any of these exhibits, Plaintiff's Exhibits 47 and 31, and so on? You don't find the word "damages" there, do you? A. O.K. Let's say in terms of their final calculation, which shows the amount that the company lost as a result of not being able to buy, that figure, that final figure, is smaller as a result of this treatment of returns than it would be if they had actually given—showed those results as having reduced the number of machines they had.

The reason is very simple: They raised the cost of ownership.

Q. Have you finished you answer? A. Yes.

Q. I take it you are not saying that the disposals of the machines, as referred to in the Leidesdorf calculations, is the same as the return of machines by Hanover under the leases, because those facts are not in the Leidesdorf calculations, are they? The return of machines is not in there? [2287] A. The return is not in there, no.

Q. You are expressing no opinion as to whether one is equivalent to the other? A. Whether one is—

Q. Equivalent to the other, namely, disposals in the Leidesdorf calculations and returns under the lease. A. Whether those would be equivalent to one another?

Q. Yes. A. I am not sure what you mean by that. What I understand by "disposals" in that report are the actual selling of the machines. In other words, at the end of the period, in 1955, you say that—you have some machines and they have some value, so you have to give credit for that value in reducing your costs of ownership, you see.

Q. I think we got into this discussion because I was asking you whether the fact that the disposals occurred in the past vitiates them for the purpose of comparison made in this case. A. I think that is right. Maybe what we need is the definition of "disposals."

Q. When you say that's right—. [2288] A. That's right, that we got into this question.

Q. The definition is contained in the assumptions on Plaintiff's Exhibit 41, bottom of page III of the Appendix, which I show you (handing). A. That is exactly what I have been talking about. It has nothing to do with returns.

* * * * *

[2293] Q. So that your intention was to say that for purposes of the Leidesdorf computations, Plaintiff's Exhibits 37, 41, and so on, it is very doubtful or somewhat doubtful— A. It is not clear.

Q. —whether tax considerations should have been taken into account at all? A. Yes. It is just not clear to me on that and I have not thought that through and I am not sure—I don't know of any theory to guide me on this.

Q. You don't know of any theory to guide you on that? A. That's right, period.

Q. I would like you to consider that answer in the light of the heads of the columns or captions in those Leidesdorf

computations, which I remind you are "Net Cost of Leasing" or "Computed Net Cost of Leasing" and "Computed Net Cost of Ownership."

Are you intending to say to the Court that in arriving at computed net cost of leasing and computed net cost of ownership it is doubtful whether tax considerations should be taken into account? A. For purposes of reconstructing the balance [2294] sheet, they were computing to find out whether or not to make a decision to buy. This is perfectly valid. For purposes, as I would classify the Leidesdorf reports of reconstructing the cash flow, it is not at all clear to me that the taxes—"net" then means net cost before taxes.

Q. This means net before taxes? A. Yes.

Q. So that the entire figures would be altered if taxes were taken into account, would they not? A. Sure.

Q. In the Leidesdorf computations? A. Sure.

Q. And in your judgment taxes would have to be taken into account in appraising the net effect of leasing and the net effect of ownership during the 15-year period, wouldn't they? A. Well, again, it depends upon the purpose for which you are trying to get this. There are a number of things one obviously can talk about putting in or leaving out and I think it depends upon what the purpose is.

This is a kind of reconstruction of the flow's net before taxes and doesn't take into account [2295] depreciation, et cetera.

Q. Haven't I sufficiently stated the purpose when I say it is for the purpose of comparing the net cost of ownership and the net cost of leasing, as stated in the Leidesdorf computations? Is that a sufficient statement for you? A.

No, that is sufficient for me. You would have to say comparison for what purpose.

Q. Well, you tell the Court for what purpose a comparison—for what purpose out of these two items, ownership and leasing, the omission of the tax item is proper. A. As I have tried to state to you, the question of making these for the purpose of this reconstruction—I said the use of taxes would be nebulous. It is just not clear to me at this point, for this purpose, whether one should introduce depreciation, taxes, et cetera, or whether it is even possible to do so. I have not investigated those calculations with respect to those issues.

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[2301] *Redirect examination by Mr. Hayes:*

Q. Dr. Cyert, Mr. Carson was just asking you about taxes and reconstructing on profit and loss statement and the balance sheet, and as to whether or not you would give effect to the taxes, and you said that you weren't sure whether you would or wouldn't, and if I recall rightly, you testified yesterday that you considered this a legal question rather than an economic question— A. That's right.

Q. —and if I recall rightly, too, you said something about double taxation, relating it to the field of [2302] public finance. A. That's right.

Q. Will you elaborate on your answer, please. A. Yes. What I tried to indicate was that there is an issue similar —that seems to me somewhat analogous. In public financing there has been this question of taxing corporation income and then taxing individuals when dividends are paid out.

In this case, as a non-legal authority, it seems to me that there is at least an analogous question here. If you take taxes into account in the calculations which is the Leidesdorf calculations, and there is some settlement on that basis—

Q. When you say settlement, do you mean recovery in the action? A. Recovery in the action, right—that this may itself, as I understand it, would then be taxed, which means that you would be taxing the funds twice, so that I would argue that if you made the calculation for recovery purposes, using taxes, in other words, made this after taxes, then what would need to be done in order to put the company back to where it should have been would be to make a settlement large enough so that after taxes—

[2303] Q. You used the word "settlement". That has a technical meaning? A. Recovery, to make your recovery large enough so that after taxes, after taxes it would equal the amount that would be arrived at.

Q. How would you do that? A. Well, with the current tax rate of 52%, in effect what it means is that you want a settlement—a recovery—such that 48% of it would equal the recovery after taxes, so that in effect if you had something like the Leidesdorf calculations, you were going to recover, let's say, the million dollars, then if you divided that by .48, that would give you the amount of money that you needed in order to have recovery after taxes to put the company back where it was or where it should have been.

* * * * *

[2481] Q. Where do you reside, Mr. Spence? A. 137 East 66th Street, New York City.

Q. What is your business or occupation? A. I am a general partner of the firm of Hemphill Noyes & Company.

Q. Will you state for the record your education and your business experience since you left college. A. I graduated from the University of Chicago in 1929. In the fall of that year I went to work for Standard Statistics Corporation, which is now Standard & Poor's. I was employed there until I went with Hemphill Noyes & Company in February 1934. At that time I was a securities analyst.

About 1939 or so I became head of the research department.

War service from about 1942 to 1946.

I returned and again was manager of the research department. On January 1, 1952 I became a general partner of the firm. About a year thereafter for a year or so I was the partner in charge of research. [2482] I became a partner in what we call our corporate finance department, which is the buying department, underwriting department or whatever name may be given around the Street.

Q. Would you tell us what the business of Hemphill Noyes is. A. Hemphill Noyes was formed in 1915 as a general partnership. It took membership in the leading stock exchanges and has continued in that business ever since. We are both corporate underwriters, retailers of securities, wholesalers and the particular department that I am in, the corporate finance department, has charge of all relations that we have with any corporate clients, whether it be private finances, public, merger, sale acquisitions or any other activity we might have with a corporate client.

Q. In the course of the business of Hemphill Noyes and specifically of your business have there been occasions

when you have advised clients with respect to the financial problems, if any, involved and the courses to be taken in matters such as choosing between purchasing facilities, machinery, et cetera, as against leasing? A. Yes, sir, we have.

Q. In connection with the preparation of your [2483] testimony in this case, have you had given to you Defendant's Exhibit 1, which is the prospectus when there was a sale of Hanover stock in 1956, and Defendant's Exhibit 47, which is a tabulation made, I told you, by an economist called as a witness by the defense? A. Yes, sir.

Q. In addition, have I given you Plaintiff's Exhibits 27, which is the quarterly Hanover cash balances from July 1939 to September 1955; Exhibit 28, which is a Hanover balance sheets from 1939 through 1954; Exhibit 29, the Sheppard and Myers balance sheets from 1939 through 1954; 30, the comparative statements of working capital from 1939 through 1954; 47, the 1938 Hanover balance sheet; 48, the 1938 Sheppard and Myers balance sheet; 49, the 1938 Hanover working capital schedule; 52, the tabulation showing the relation between cost of machinery, rentals paid and assuming the borrowing of the money at a rate of 6%; 53, a similar tabulation at a rate of 2%, and 54, a tabulation showing loans made by Hanover? A. Yes, sir, you have.

Q. In addition, have I given you three pages which I told you contained paragraphs 7, 8 and 9 of a stipulation of facts entered into in a prior trial in this [2484] action? A. Yes, sir.

Q. And in connection with your testimony have you studied those various documents? A. I have, sir.

Q. Mr. Spence, will you direct your attention first to Defendant's Exhibit 47, which is the tabulation I told you was prepared by an economist called as a witness by the defendant. A. Yes, sir.

Q. Do you have it before you? A. I have it before me.

Q. I direct your attention further to Table I of that exhibit, which is headed Sales of Common Stock to Members of the Corporate Family. A. Yes.

Q. Do you have it? A. Yes, sir.

Q. There has been introduced in evidence in this case, Mr. Spence, testimony and documents to the effect that the sales set forth on Table I of Defendant's Exhibit 47 were in part sales to the existing stockholders of Hanover, of whom in 1939 there were just six, all of whom were members of either the Myers family or the [2485] Sheppard family, the elderly Mr. Myers and Mr. Sheppard having organized the company around 1900; that the balance of the sales set forth on Table I were sales to key employees, made to them for the purpose of—as a reward for past services and as an incentive to their continued employment in the company; that there existed also among all of those who held stock in the company an agreement whereby no stockholder could sell any stock he held without first offering it to one of the six stockholders in 1939 who had a certain period of time in which to elect to purchase or not, and if the stock was not purchased by one or more of those stockholders, then to offer it to the corporation, and if the corporation didn't buy it, then the stock was free and the stockholder could sell to whomsoever he pleased.

It was further a part of the agreement among the stockholders that at the time of any sale the sale would be

made in accordance with the formula which provided—I mean a sale by a would-be stockholder to the others or to the corporation—which provided in substance that the sale would be at the book value of the company, except that inventories were to be taken in at 85% of book value—let's see, there was one other consideration I wanted to get in here—oh, further, that [2486] when the policy was initiated in 1940 of selling stock to employees, the price to the employees would be based on exactly the same formula, to wit, the book value of the corporation, discounting the inventories, however, by 15%, and that all of the sales set forth on Table I of Defendant's Exhibit 47 were all made, whether to family or employees, at the discount book value which I just mentioned to you.

Now taking those facts into consideration are the sales prices set forth per share on Table I of Defendant's Exhibit 47 in your opinion any measure of the market value of the stock or of what the public would pay for the stock? A. No, sir, not in my opinion, when I examined these figures, and, for instance, in 1948 the sale prices are approximately—I would say are not even two times earnings. The ratios do vary from year to year but it is very obvious to me that such prices at such low earnings ratios would have no merit at all in a free and public market. It would be ridiculous to pay two times earnings I think for something like this.

Q. What are your reasons for stating that opinion, Mr. Spence. A. Well, normally, common stocks are valued in the [2487] market—I would say one of the first considerations would be earnings, the position of the company, the conditions in the economy and particularly the record of

the company in its industry. There is an old rule-of-thumb which still is a fairly handy thing to have that ten times earnings is your first look. You would evaluate that and define it, but when you get two and three and four times earnings, that is very, very unusual. Usually to get an explanation for it, but not with a record such as this company has.

Q. Say that again. A. I said usually there is a good explanation for it, but not with a record such as this company has, where it may be the earnings have fallen off subsequent, but with a company that has an impressive record such as this one, I would say two times earnings is a ridiculous price.

Q. What if anything significant has book value in determining the market value of a stock or the market price of the stock in an industry such as Hanover? A. In almost any corporate industrial security I'd say book value has virtually no bearing. It might have on a mutual fund or something like that but it would be one of the very, very minor considerations in [2488] evaluating an industrial corporate stock.

Q. You mentioned a rule-of-thumb of ten times earnings. Will you turn, please, to Table II, which is page 3 of Defendant's Exhibit 47. A. Yes, sir.

Q. You will note that for each of the years there is set forth in one column stockholders' equity as of the end of the preceding year, the net profit after taxes for the current year, and a rate of return which is nothing more or less than a net profit after taxes, divided by the stockholders' equity at the end of the preceding year.

In your opinion, Mr. Spence, what significance has the rate of return arrived at by dividing the preceding—the

stockholders' equity, rather—into the net profit after taxes —I am sorry I lost my question. I will start over again. I have forgotten how I started.

In your opinion, Mr. Spence, what significance is a calculation which arrives at a rate of return which is merely a percentage determined by dividing the stockholders' equity into the net profit after taxes in determining the market value of a security? A. Well, again I would say very little. I think we always look at the earnings per share rather than [2489] the rate of return on the equity at one particular period. I will say that these are very handsome rates of return, and therefore might have some bearning in a comparative evaluation of stocks, but again I think that the determination of market value in a free market is going to be the trend, and the amount of earnings per share, of financial position in the industry and the general economy. In other words, I don't think that this in itself has any bearing on what the market price might be.

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[2492] This, remember, was a privately-held corporation at that time. The stock market at that time was not particularly favorable to new issues, although it was beginning to show some improvement. I think when you had examined a company that had a net worth of $4.3 million at the end of 1938, unencumbered assets; net fixed assets of $1.4 million, investment in a subsidiary; working capital of $2.4 million and only one liability really of something like $87,000 for taxes, that you would have determined that the cost of going to the public for $500,000 of equity would probably be prohibitive when it was very

apparent the company could borrow that money on probably very favorable terms.

At that time the prime rate was 1½% for commercial bank loans; we had an Administration in power which was committed to easing money and low interest rates, our advice, I am positive, would have been that you should go to your local bank and see if you can't get either a line of credit in this amount or take it [2493] on a normal bank loan. We could have talked with them, I presume, about the possibilities of taking a long-term insurance loan, which would have been at a higher interest rate; we could have imposed certain restrictions which are typical insurance company loans, and as I say, I presume as an investment banker we would have outlined to them the many advantages that also go with a publicly-owned company, but I am sure that for that amount of money in 1939 they couldn't in all conscience recommend that they go with a public equity issue.

Q. And do you understand your answer in substance to be that you would have advised them to buy the machinery and to finance it— A. Yes, to buy it. I think the arithmetic shows very obviously that buying it was more favorable than renting it.

Q. And to finance it if necessary by borrowing from a bank? A. Yes, sir.

Q. And you mentioned the prime rate was 1½%. In your opinion, at what rate could Hanover have borrowed from a bank at that time? A. In my opinion they were a prime credit, but [2494] certainly they would not have had to pay more than ½% above the prime or say 2% at the maximum.

* * * * *

[2514] Q. Have you observed in the business world recently a rise in leasing companies and a growth in leasing practices?

* * * * *

A. Yes, sir, there has been quite an increase.

Q. There has been a great increase in recent years, has there not, in the leasing of equipment as [2515] against the purchase? A. Yes, sir.

Q. Is it not true that a great number of different commodities have been put on that basis; such as earth-moving machinery, trucks, farm tools, as well as automobiles, passenger automobiles? A. It is possible to lease almost anything today, I would say.

Q. To what do you as an expert attribute the rise in these leasing practices? A. I think our present tax structure is a very important part of it. Then I think also it is the measurement of a company that has a certain amount of capital—it is just a question of arithmetic: it is better for them to use their capital in some other phase of their business or is it better to lease or own, and I think possibly, as I say—actually I think our tax structure is one thing that has contributed tremendously to this leasing.

Q. That is the tax structure that has been in existence since 1939? A. At different rates.

Q. And the leasing practices we speak of have been growing since that time? [2516] A. They have been.

Q. You just now said that it is a question of whether it would be better for a company to use its capital in purchasing a given thing rather than use it elsewhere; how would you measure "better"? A. I think it is just a pure question of arithmetic. If it is going to cost you so

much in rents to lease the same amount of money you could use to purchase, perhaps you could use it in your business some other way. I think it is a matter of arithmetic. Often the decision is made to buy rather than to lease just because on arithmetic they think they will come out in the long run with better earnings overall. I don't think you can make any decision that it is better to lease or it is better to buy until you examine all the facts in each particular case.

Q. You have to examine all the facts in the particular case, do you? A. That's right.

Q. Would you yourself advise a client, a corporate client which raised its money by public issue at, say, twelve times earnings, to put the proceeds of the issue into the purchase of a fixed asset or of any asset of substantial size which would yield less than [2517] twelve times earnings? A. Which would yield less than—

Q. Which would yield a lower return. A. No. I think they should attempt to at least maintain their return or improve it if they can. We come back to a question of arithmetic. It is possible, however, that sometimes you must buy machinery or have your return go down. There is a question of obsolescence, new practices, new developments, where it may require you to spend money, even though you can't maintain the return. It is pretty much arithmetic, your best judgment at the time.

Q. If you have a choice between leasing and purchasing you can obviate the risk of obsolescence by leasing, can't you? A. Usually.

Q. So that when in your previous answer you spoke of having to invest capital at a poorer rate of return because of obsolescence, you were assuming that the customer or

client already owned the asset; is that it, the machinery? A. I didn't particularly have that in mind; I just meant that that was one factor that must be considered, among others.

[2518] Q. What other factors must be considered? A. Well, as we said, return—in other words, the arithmetic of it—if we have a piece of equipment that costs X number of dollars and we can rent it for a certain term at a certain figure, or we can put the capital in and buy it—now, which is going to be more favorable to us? In other words, can we buy this and earn enough on it so that we are better than if we rented it and paid all these rentals on it?

Q. I am just trying to get you to tell us what you take into account in the arithmetic, and let me ask you some leading questions. Would you take into account depreciation? A. Yes, sir.

Q. Taxes? A. As a refinement, yes.

Q. Refinement? Isn't that a prime element, the taxes? A. Yes.

* * * * *

[2521] The Court: If Hanover had purchased this machinery for about $600,000, as Mr. Hayes indicated, [2522] in 1939, and financed the purchase by a bank loan at about the prime or half-above-prime, what might have been the other terms of that loan? Would it have been a demand loan? It would be, wouldn't it?

The Witness: It would be or could be. In that case, at the prime rate, it would probably be a one-year loan.

The Court: If the prime went up, the interest rate would go up, wouldn't it?

The Witness: It would, sir. Of course we know what happened, but the only thing I think you could say on that is that a company with that credit would have no problem in renewing the loan.

The Court: It would have to be renewed at a higher rate if the prime increased?

The Witness: Yes, sir.

The Court: What were the prime rates?

The Witness: I stated 1½ per cent.

The Court: In 1939. What were the prime rates after that?

The Witness: The first change was in 1947 when I think it went to 1¾ per cent. It stayed at 1½ through 1947.

The Court: It is a little more than that today, [2523] as I remember.

The Witness: I think the risk you could measure there was that we had this federal administration was committed to lower interest costs.

The Court: I don't think there is any doubt that a company like Hanover would qualify for either the prime or not greatly in excess of it.

* * * * *

[2422] Q. Now you have before you, Mr. Laird, Plaintiff's Exhibit 92 for identification. Wll you tell us what that is? A. That is a copy of the minutes of a special meeting of the stockholders of the Hanover Shoe, Inc., of June 26, 1939.

Q. And is there anything attached to it? A. There is nothing attached to it. There is incorporated in it—

Q. Pardon me. Incorporated in it— A. —copies of a certain stockholders' agreement, accompanying agreement.

Q. Did you prepare those minutes? A. I did.

[2423] Q. And the accompanying agreement? A. I did.

Q. How many stockholders did Hanover Shoe, Inc., have at that time? A. In June 26, 1939, they had six stockholders.

Q. And were they all members—how many families were represented? A. Two families, the co-founder, C. N. Myers, and the family of co-founder, H. D. Sheppard.

Q. And of those six stockholders were any of them officers and/or directors of Hanover at that time? A. C. N. Myers, H. D. Sheppard and Lawrence B. Sheppard were all officers, were all directors, and up to a short time before this were the original—comprised the whole board of directors. There were three directors and they were all principal officers of the company and its subsidiary until shortly before this, probably a year earlier, two other directors were added, they being sons, other sons of H. D. Sheppard and C. N. Myers, respectively.

Q. Now, with respect to the three who you said were the—up to 1939, say— A. Around '38.

[2424] Q. —were the only directors and were also officers, one was a—were the two other than Mr. Lawrence B. Sheppard and the Mr. Myers who had started the company around the turn of the century? A. Right. Mr. H. D. Sheppard was the father of Lawrence B. Sheppard.

Q. Right. Now, will you tell us what the purpose was for the stockholders' agreement which you drafted and

which was approved by the stockholders as appears in Plaintiff's Exhibit 92 for identification?

Mr. Carson: Objected to as varying a written document, and irrelevant.

The Court: What is the purpose of the question?

The Witness: The purpose—

Mr. Hayes: This has to do with the foundation that I promised I would put in while Dr. Cyert was on the stand.

The Court: Overruled.

A. Well, the purpose is as recited in the document itself.

Q. I know. Can you summarize it for us, Mr. Laird?

[2425] Mr. Carson: Same objection, your Honor. We have the document.

The Court: Yes, it is a written agreement.

Mr. Hayes: All right. I offer in evidence Plaintiff's Exhibit 92 for identification.

Mr. Carson: No objection.

The Court: Admitted. This document speaks for itself.

Mr. Hayes: Yes, I suppose so.

Mr. Carson: Too bad, but it does.

(Plaintiff's Exhibit 92, previously marked for identification, received in evidence.)

Q. Did I ask how many stockholders there were at the time? A. Six.

Q. Did there come a time when the number of stockholders increased? A. It did.

Q. Will you tell us how that came about? A. Shortly after the stockholders' agreement was executed in June of 1939 discussions were held with the officers, at which I was present, and both the advisability of distributing some stock by sale to some employees of the company, to bring to an end [2426] the family corporation, in which all stock was held by six members of the two families, to make some distribution among certain employees who were generally referred to as key personnel.

There was no stock available to issue at the time and, as I say, I left the company in 1939, shortly after this agreement was made, and returned in 1940..

When I returned in 1940—the beginning of '40—there were still further discussions about this and it was decided to amend the charter and increase the capitalization, the number of shares, from 101,000 to, I recall, 200,000 shares of stock.

[2427] Q. Had all the authorized stock prior to that time been issued? A. It had all been issued. That was done a few months later, later in 1940—this charter was so amended. There were discussions in the interim and Mr. Lawrence Sheppard, to initiate this program, transferred 50 shares of stock standing in his name to five employees, 10 shares each. Almost immediately after the—

Q. Was that a gift or a sale? A. I think that was a sale. I cannot be bound by that answer. I can't recall. I am quite certain it was a sale. A very few days after the charter was amended and some 99 more shares of stock were available for issue—

Q. You mean 99,000? A. 99,000—a discussion followed concerning how many shares might be distributed. It is

my recollection that the board of directors finally authorized the issuance of somewhere between five and ten thousand shares of stock. Mr. Lawrence Sheppard was very insistent that he wanted to make an immediate distribution of 2500 shares. That I remember well. [2428] The other stockholders, not these five who had received the ten shares each, and who were going to receive part of this next distribution—the original six stockholders wanted some stock. They felt they would like to have some more too, so some resolution was adopted authorizing the issuance of somewhere between five and ten thousand shares and 2500 of that was taken by Mr. Lawrence Sheppard and almost immediately distributed among those five employees to whom he had earlier in the same year distributed 50 shares. The other stockholders took up part of the offer. I recall that Mr. C. N. Myers said he didn't want to take any more stock, but his son and daughter, Mr. Lawrence Sheppard, and his brother, did take it, and Mr. H. D., the senior member of the firm, took a few shares. I don't know how many were taken or the amounts they took, but I do recall they didn't take quite all of the offer. There was a little left in that particular offer that was not issued. That resulted in the immediate distribution of 2500 shares more of stock to the five employees.

Q. The stockholders' agreement which is incorporated in Plaintiff's Exhibit 92 contains a price formula for sales among those six stockholders or sales back to the [2429] corporation, does it not? A. That's right.

Q. Was there any price formula arranged among the officers and directors at the time the decision was made to sell to employees as to the price employees should pay?

A. Yes; the exact formula as set forth in the stockholders' agreement made by the six original stockholders in 1939. In fact, all stock purchased by employees was to be held in strict accordance with the provisions of the major stockholders' agreement that had been made in June of 1939 as to transferability—it was to be restricted in the same manner and if transferred was to be transferred under the same procedures as set forth and at a price arrived at under the exact formula, and each stock certificate was stamped on its face with a note that the transferability of this stock, represented by the certificate, was restricted by the provision of a certain agreement of June 22, 1939, on file with the company. We said it could be examined there, or something to that effect. They held their stock under the same restrictions as the six originals did.

Q. Were further shares of stock sold to employees [2430] after 1940? A. Oh, yes. There were a number of sales.

Q. Suppose I, to make it short, told you that the record shows there were sales in 1941, 1942, 1948, 1949, 1950 and 1951; would that generally accord with your recollection? A. Yes, and after 1951.

Q. Yes. I am thinking at the moment just down to 1951. A. Yes.

Q. You have before you Plaintiff's Exhibit 102 for identification. A. Yes, sir.

Q. Would you tell us the circumstances for the making—which apparently is an agreement among various shareholders, other than the members of the family whom you mentioned—will you tell us the circumstances which led

to the making of this agreement? A. When the early shares of stock were transferred to employees it was felt that marking them on the face with the notice that they were held under the same conditions as were set forth in the major stockholders' agreement of 1939 was satisfactory and the first stock sold—on the first few blocks of stock [2431] sold to employees there was no written agreement made with those employees. They were bound by this agreement and that was felt sufficient.

Q. When you say "this agreement," you mean the 1939 agreement? A. Yes. I don't know how many shares were transferred under those circumstances, but there came a time when we realized that while they were bound by the same conditions as were set forth in this agreement, this agreement of the six original stockholders didn't require them ever to offer their stock or sell it; they might hold it indefinitely. This only prescribed the manner in which they could sell it if they chose to.

Q. By "this agreement," you refer to Plaintiff's Exhibit 92? A. Yes. It was realized that the employees who had been granted the privilege of buying stock under a verbal understanding, that if they left the company they would not take the stock with them but would within a reasonable time offer it back to the company or to the major stockholders—it was felt that that probably ought to be reduced to writing and within five years after the first stock was issued to employees—I don't remember the date—an agreement was drawn and all [2432] employees who then had stock agreed that they were preparing this document in confirmation of a verbal understanding that accompanied their purchase of stock, to the effect that if their employment terminated for any cause

whatsoever they would offer the stock, within a prescribed time—I think it was by March 1 of the year following the calendar year in which their employment terminated—they would offer the stock to the six original family stockholders.

Mr. Carson: Excuse me. If this is in writing, I think we should have the agreement.

The Court: Is this Exhibit 102?

Mr. Hayes: This is the circumstances leading up to 102.

The Witness: We don't have that in writing. This agreement I am talking about was made probably in 1944 and the employees, up to that time, who had purchased stock signed that document.

Mr. Carson: Signed what document?

The Witness: That we prepared in 1944.

By Mr. Hayes:

Q. Were the 1944, and up to 1953—do there now exist any written agreements that were entered into between employee stockholders between November 1944 and [2433] 1953? A. No.

Q. What happened to them? A. They were destroyed.

Q. At what time? A. Well, I don't know.

Q. Was it at about the time that Plaintiff's Exhibit 102 for identification was— A. Yes. Thre was no need to hold them any longer. Plaintiff's Exhibit 102 brought everything up to date.

Q. What was the purpose of the company and of the officers and directors in permitting employees to purchase stock?

Mr. Carson: Objected to. Irrelevant and not the best evidence.

The Court: Is this part of 102?

Mr. Hayes: To a degree it is, your Honor, in so far as 102 goes back to 1944, but it doesn't cover the purchases made in 1940 and 1941.

The Court: Doesn't cover what year?

Mr. Hayes: If you have Plaintiff's Exhibit 102 before you, your Honor, you will see it refers to, from time to time, beginning in November '44, they were permitted to purchase certain stock—Mr. Laird [2434] has testified that originally there were only oral agreements, so that the references here would seem to cover only the sales to employees since November 1944. Mine is a general question covering all sales to employees, including those where there were oral agreements.

The Court: Doesn't 102 speak for itself in so far as the sales from November 11, 1944 are concerned?

Mr. Hayes: It does. It doesn't cover the sales in 1940, 1941 and 1942.

The Court: I sustain the objection in so far as it applies to the sales before 1944.

Q. At the time the policy was adopted in, I think you said, 1940, of selling stock to employees, key employees, what were the purposes of the Company in doing so? A. The purposes were as a major reward for services rendered by key personnel, as an incentive to key personnel, by providing that they would have some proprietory interest in the company for which they were working, have an opportunity to share in any success that the company

might have, the rewards of successful operation. That was just about the purpose in offering them stock.

[2435] Q. Were there any other purposes that occurred to you? A. Well, the purpose in deciding to make stock available to employees included one other factor: It was realized that we had to bring in more executive employees. We knew that. The founders were getting old and their work was tapering off and we were finding it difficult to get top-grade executives, which in most cases you had to draw from another company, by mere payment of salaries. The tax picture being what it was, a generous salary was not enough inducement, in many instances; they wanted an opportunity to get equity in the company, buy stock in the company, and this offer to allow them to purchase stock we found to be quite an inducement in some instances.

Q. Who drafted Plaintiff's Exhibit 102 for identification? A. I did.

Q. And you are a signatory to it, are you not? A. I am, yes, sir.

Q. Was that signed by all the then employee stockholders? A. All that held stock at that time.

Mr. Hayes: I offer it in evidence.

[2436] Mr. Carson: No objection.

The Court: Admitted.

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Excerpts from Separate Trial on the Passing-on Issue Before Goodrich, J.

Direct Examination—Lawrence B. Sheppard

(61) Q. Now, let me direct your attention for a moment, Mr. Sheppard, to the retail prices at which the shoes are sold in the stores. What are the factors which entered into the fixing of the retail prices in the stores? A. Well, the factors—the principal factor in fixing (62) retail prices in our stores is competition. Of course, increases in raw material or labor usually affects us all, I mean, the entire shoe industry. However, we must fix our prices at the retail level so that we are competitive at all times. If we did not do that, it would be fatal to our business. It is a creed with us. It is a creed. It is essential, mandatory, that we must get our share of the men's shoe business in any given locality in which we are located or hope to get a lead in.

Q. Did you also participate in discussions or decisions made with respect to retail prices of Hanover shoes in the retail stores? A. Always.

Q. During the whole period of sixteen years? A. Yes. sir.

Q. Was there ever any price change made in the retail prices without consideration being given to the prices of competitors shoes? A. No, never. It could have been fatal if we had slipped on it.

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(63) *By Mr. Hayes*:

Q. Mr. Sheppard, directing your attention to the discussions having to do with the fixing of the prices to Sheppard & Myers, in any of those discussions was mention ever made of the cost of machinery leased from United Shoe Machinery? A. Never.

Q. In any of those discussions, was mention ever made of changes or variations in the cost of machinery leased from United Shoe Machinery Company? A. No, never.

Q. Directing your attention now to discussions having to do with the fixing of retail prices in the stores, was mention ever made in those discussions of the cost of machinery leased from the defendant, United? A. Never.

Q. Or in such discussions having to do with retail prices, was mention ever made of changes in the cost of machinery leased from the defendant, United? A. No.

* * * * *

Q. What elements were considered in fixing the billing price to Sheppard & Myers? A. Most generally anything that took a sudden jump and looked like it was going to be permanent. It so happens that the only major items, and I referred to major items in my previous sentence; the only major items that give you serious headaches was a sharp increase in labor at certain times, and hide and leather prices almost constantly. That was very frequent. Now, they were the two big things that we did practically all of our discussing about and the two big things that would cause shoes prices to go up and sometimes to come down, although you'd have to cut labor off; labor never came down, but the raw materials did and prices follows the—pretty well followed the trend of the raw material market. It wasn't—these meetings weren't all to raise prices; many of these meetings and conferences were to lower prices, and there, when that happened, it was always raw materials is what made it possible.

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(110) *Redirect examination by Mr. Hayes*:

Q. You were asked on redirect, Mr. Sheppard, and if I recall correctly it was stated that material price changes did not affect your billing prices or your retail prices. Would you please explain how Hanover Shoe Company purchases and handles its inventory of leather and hides?

A. Since long ago I went with the company in 1921 the Hanover Shoe Company was unique, I think, among all shoe companies in its purchasing policies. My father taught me when I came there to buy when the other—when the competitors, other manufacturers, did not want to buy, and not be afraid to buy. The policy I inherited from him I practiced all my life, and we have been well known throughout the leather and shoe industry for buying huge quantities of materials at times when others hesitated to buy or did not want to buy for some reason, and consequently we were able in many, many instances to ride out the peaks and vallies of the leather market.

As I believe I said on the witness chair today, we carried huge and do carry huge raw material inventories that are not comparable to the inventories of most shoe manufacturers. They are much, much larger. Now, that permites (sic) us when we choose to do it to absorb numerous minor increases, and there is no (111) effort made then and at that time to put ourselves on what you might say the current market, and I didn't say in this respect that an increase or a decrease of three or four or five cents a pound would not cause use to increase the price of shoes, either billing or at retail, particularly the retail, because it must be borne in mind that our retail prices nearly always go up and down in units of either fifty cents or a dollar; never five, six, seven, twelve cents; never.

Now, this jumps your retail prices fifty cents, might not sound like much of a jump in a pair of shoes, but that fifty cent jump can hurt your competitive position under certain circumstances. There are other times when the jump of a dollar, which is rather infrequent, would hurt you less than a fifty cent jump at another time, but those increases are never less than fifty cent units, and I would like to say this if I may.

The billing prices to the stores—Again I repease (sic) that is an interoffice—inter-official act. The important act of those same officials is when they tamper with the retail price because the one company is wholly owned subsidiary of the other company. It is just a question of which pocket it comes out of actually, but that doesn't affect in itself the buying public. It is a retail price that the buying public pays. It doesn't have anything to do with this intercompany billing price.

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Direct Examination—Robert M. Laird

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(120) Q. Was there some operating reason for that, Judge Laird? A. Yes. The changes to Sheppard & Myers were very often changes of ten cents a pair, 15 cents a pair, 20 cents a pair. In the retail field we couldn't make that type of change. I might put it this way: It was 50 cents or nothing. We weren't compelled by law to make it 50 cents or nothing, but historically the only one of two changes in my time were 50 cents or a dollar up and down, and we couldn't keep changing ten cent changes, and 15 cent changes, without destroying our whole pattern and our historical position with the men's shoe buying public that we had the fixed price, a line price.

Q. What was the reason for the lesser changes made in Sheppard & Myers billing prices? A. Well, they were in a sense interdepartmental. They were intercompany, but they were intended to reflect factors that we considered an increase or decrease to the subsidiary company certain factors that we considered, and those changes were made to reflect that at least in part, or to the extent we thought they ought to be reflected by our record.

Q. What factors were they? A. Material market, largely leather hides and leather. I don't remember of ever hearing discussed thread or nails or (121) wax or dressing, but always it was confined to hides or leather, and there were interrelated or labor charges.

Q. Now, in any of the discussions in which you participated with respect to the possible changes in the billing prices to Sheppard & Myers, whether that eventuated in changes or not, was the cost of the shoe machinery leased from United Shoe Machinery Company ever mentioned? A. It was never mentioned in my hearing.

Q. In any such discussions were any changes in the cost of the machinery leased from United Shoe Machinery ever mentioned? A. Never in such conferences. I don't mean to say that I did not know that changes were made in the cost of the machinery, but they were never mentioned in any discussion or conference that had to do with the question of whether our price should be changed or unchanged —remained unchanged.

Q. With respect to any such discussions relating to changes in retail prices, whether the discussions eventuated in changes or not, was the cost of machinery leased from United Shoe Machinery ever mentioned? A. Never.

Q. Or were changes in the cost of shoe machinery leased from United Shoe Machinery Company ever mentioned? A. Never.

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Redirect Examination—Robert M. Laird

(126) *By Mr Hayes*:

Q. Toward the close of yesterday's session, Judge Laird, you mentioned in response to a question, that so far as the retail prices in the stores were concerned, in addition

to material and labor there were also mentioned matters of taxation in the various states in which the company maintained retail stores. Will you please state, what if any other matters were considered in the fixing of retail prices in the stores? A. Well, in addition to the major factors of cost of material in the shoe and the cost of labor in the shoe, there was the factor of cost of labor in selling the shoe with upwards of four hundred employees involved in the sales personnel of the subsidiary company and a payroll of more than $1,000,000 a year. That was a major factor because it changed from time to time.

I have mentioned local taxes in the jurisdictions where our various stores are located, franchise taxes, doing business taxes, and cost of various types of taxes always changing.

There was the matter of rental of store sites (127) involving upwards of a million dollars a year and changing, because our average lease is probably slightly over five years—between five and seven, which means that anywhere from a dozen to three dozen leases expire each calendar year, and during the last ten or twelve years the trend has been steeply upward on retail leases. I say that with hesitation since the landlord of our local store is present, but when leases expire we generally find we have to go up on a renewal. Those things are taken into consideration, not all of them in every one of the conferences, but all of them at one time or another during a given period, and since those conferences which result in retail price changes probably average only one a year—I think in the sixteen years covered here—there were less than sixteen retail price changes, and if we set aside one short period of a few weeks in 1951 when we made three, why, there were only

probably ten or eleven price changes in the sixteen years, so that these factors can change materially between one price change and the next price change, and over and above all these factors, and overriding them immeasurably is the question of our position with reference to competition.

That involves in each instance a detailed study of valuation, a review and appraisal of what competition has been doing recently, what insofar as we know they are about (128) to do, and our judgment as to what they must do and will do or will likely do in the rather near future. That is the major consideration in my opinion when we come to settling or determining changes or non-changes in retail prices.

Now, in our billing prices between the two companies we have absolute control of the price picture. We can do as we please. We try—we endeavor to set these prices realistically, just as business policy dictates we should, not out to try to fool ourselves. It is all right to fool our competitors but not ourselves. These intercompany prices will not affect one iota the consolidated gain and loss, profit and loss, financial statement and balance sheet at the end of any year. All that has happened in those instances, we have reached in our left pocket and transferred some of the profits, if we had any profits to earn, to our right-hand pockets, but in retail price setting that is not true.

An error there will quite often result in finding that our competitors have their hands in our pockets, and that will be reflected on the final balance sheet at the end of the year. To a large degree, our competitors set our retail prices. Certainly they set definite limitations in which we can make and maneuver our prices.

In a given category or classification of our shoes, a price line, a certain price line, I think it is a (129) fair

statement to say that competition at least sets a ceiling on that kind of shoe, a ceiling price on that kind of shoe just as effectively as the OPA did with their ceilings. We could not go beyond the ceiling that OPA set for local prices. We can't go beyond the ceiling the competition has set in that given category of shoes for economic reasons. We will go broke if we do because we will lose the pairage and the volume.

* * * * *

(130) *Recross examination by Mr. Kiendl:*

* * * * *

Q. But now, Mr. Laird, is it fair to say that you have had an opportunity to explain all the factors and all the considerations that influence the judgment of these meetings that you had in fixing both billing prices and retail prices? A. I have had a fair opportunity—I think I could have missed something, but I think I have had a fair opportunity. I think I have.

Q. Would it be fair to say that in none of those discussions, the sixteen times that retail prices— A. I don't think it was sixteen. I think it was fourteen or twelve.

Q. I think you said it was less than sixteen? A. Yes.

Q. Whatever it was. A. Yes.

(131) Q. In all those times there was never mentioned any factor costs other than those items you have given? A. Never.

Q. Rentals and royalties were never mentioned? A. Never.

Q. Machinery costs were never mentioned? A. No.

Q. And all those items that entered into manufacturing expenses other than material and labor were never mentioned? A. Never. • • •

• • • • •

Plaintiff's Exhibit 24

[LETTERHEAD OF]

NATIONAL SHOE MANUFACTURERS ASSOCIATION

Chrysler Building—Room 940

New York 17, N. Y. MUrray Hill 9-8114

August 29, 1950

To: Technical Committee

Charles H. Jones, Jr.
Allen Cadwell
B. A. Gray
Charles F. Johnson, Jr.
Warren Reardon
L. B. Sheppard
S. L. Slosberg
Weir Stewart

From: W. W. Stephenson

Following the meeting of the Technical Committee which was held in New York last week, I have undertaken to draft an outline which with proper scrutiny by the members of the Committee and necessary redrafting, might become the written or oral statement from the Committee to the United Shoe Machinery Corporation.

This outline covers the various points that were brought out in the Committee meeting, but is couched in general terms and may require some documentation.

Unless the Committee is prepared to adopt a very vigorous position in its dealings with the United, in my opinion there is no purpose in continuing the protest in which case it will be necessary for the Committee to

report its impotence to the Board of Directors and to the membership.

I have no pride of authorship about the enclosed outline, either as to phraseology or suggested policy and procedure. My intention has been to provide a starting point from which the other members of the Committee could offer constructive criticism and suggestions for a course of action which would justify the efforts of the Committee. If it is the decision of the Committee to pursue the question of old machines which have been amortized many times over, then each member of the Committee should compile and furnish to us a considerable list of such machines with their history as to date of installation, total payments to United, etc.

Plaintiff's Exhibit 24

[LETTERHEAD OF]

NATIONAL SHOE MANUFACTURERS ASSOCIATION

August 29, 1950

STATEMENT FROM THE TECHNICAL COMMITTEE TO THE UNITED SHOE MACHINERY CORPORATION

Since the initial impact of the unit charge increases announced on July 31, the Technical Committee of the National Shoe Manufacturers Association has given serious thought to the effect of these increases, and particularly to the trade relations between the industry and the United Shoe Machinery Corporation. In addition to its own deliberation, the Committee has availed itself of the advice and opinion of a large number of manufacturers who are members of the Association, but not on the Committee. Certain opinions have been formed, which while not fully conclusive may be said to constitute the studied attitude of the Committee, and we believe that this attitude will be concurred in by the vast majority of shoe manufacturers. Certain conclusions and recommendations are set forth below.

The Committee recognizes that any company doing business today is faced with increased costs, many of which cannot be controlled and it is recognized also that the management of a corporation has the responsibility to earn a fair return for its stockholders.

If shoe manufacturers increase prices, as all of them have done several times during the past ten years, their customers have the privilege of examining the new price schedule and making a determination as to whether they

will pay the new prices or buy their shoes elsewhere. Under these circumstances and under the pressure of strong competition from many other producers, shoe manufacturers can and do increase and decrease their prices without prior consultation with their customers. Since the customers of the United Shoe Machinery Corporation in most instances do not have the privilege of similarly evaluating a new price schedule and similarly accepting or rejecting the goods and services of the United Shoe Machinery Corporation, the Committee feels that any action as drastic as the one taken on July 31 should be taken only after a frank and complete discussion with representative members of the industry and after consideration has been given to all factors affecting both the Corporation and the industry. Such a discussion held in a spirit of friendly cooperation and understanding might be expected to develop a rate structure which would meet the financial needs of the Corporation and at the same time would be one which shoe manufacturers could understand and accept. In the absence of any such cooperation by the United Shoe Machinery Corporation with representatives of the industry, this Committee must of necessity hold its deliberations in the light of such facts as can readily be obtained.

From a study of such available material, which includes the earnings record of the Corporation for the past ten years, the Committee is not convinced that the additional revenue which will derive from the new rate schedules is required to keep the Corporation in sound financial condition and to preserve earnings records consistent with the history of the Corporation.

The above statement is made despite a reluctance on the part of the Committee to place itself in a position of judg-

ing what the proper earnings of any company should be under the free enterprise system. Nevertheless, since the statement made by the president of the Corporation to representatives of the Committee on August 7 emphasized that the unit charge increases effective July 31 were essential to bring the earnings of the company up to what the officials and stockholders deemed an appropriate level, the Committee feels that on behalf of the industry and the companies represented by its members it has the right to probe this particular question, especially since the additional revenue derived from the increases will come out of the pockets of shoe manufacturers. This is particularly true since the only choice a shoe manufacturer has is to pay the increases or stop making shoes.

Based on previous discussion with United officials, and a study of past records, the Committee is frankly puzzled by the apparent inconsistency between the expressed need of the Corporation for very substantial increases on specific machines and the claim that increased overhead costs must apply to all machines, therefore increased total revenue is necessary. To be more specific, there are thousands of "old" machines in use throughout the industry which have returned to the United thousands of dollars per individual machine over and beyond the initial or replacement cost of such machines. It is inconceivable to the Committee that up to 100% increase is necessitated on any of these "old" machines in order to make them profitable. It also is inconceivable that these fully amortized machines should be charged with any substantial part of research and development costs, particularly since newly developed machines which come out of Beverly invariably are offered

to the industry at rates which would appear to include development costs when these rates are compared to rates on the machines which they displace. While it may be claimed that these newly developed machines, in addition to being expected to defray their cost of development are more efficient, and therefore are profitable to shoe manufacturers at the higher rates, it is the feeling of the Committee that the shoe industry has not shared equitably in the profitability of new machines which have been developed in recent years.

In this connection we call attention to a publicized report purported to have been made in 1946 by G. L. Leinau of the United Research Division to Clifford Roberts to the effect that terms on newly developed machines are "predicated on taking all of the direct labor saving that will result from the use of these machines and in some classes of shoes, taking a bit more." The subject of rates on newly developed machines is introduced here because it forms an important part of the whole question of rate structure and in the opinion of the Committee such rates have been fixed without due regard to the cost savings which the new machines will effect for the manufacturers who use them.

From the foregoing it must be apparent that there are a number of important points on which there is disagreement between the United Shoe Machinery Corporation and this Committee. The Committee believes that these differences should be resolved in an atmosphere of friendliness and understanding, and that in addition to closer cooperation and more frank discussion of present and future problems, there are certain specific concessions which the United should make both for the sake of equity and for

the purpose of eliminating conditions which cause misunderstanding and dissatisfaction.

Specifically, we ask on behalf of the National Shoe Manufacturers Association and its members who produce the bulk of the footwear manufactured in the United States, that the United Shoe Machinery Corporation adopt the following policies and procedure:

1. That the United discuss with a representative committee of the industry the reasons for the increase of July 31 and that these discussions be supported by factual data instead of statements of generalities. It is further proposed that a similar procedure be followed in case of any increases or important policy changes contemplated in the future.

2. The Committee urges that consultation be held between the United and industry representatives with a view to selecting certain machines now offered on a lease basis only and establishing such machines on a basis of optional lease or outright purchase.

3. The Committee requests that similar discussions be held with a view to establishing cut-off points on certain machines after which the machines would become the property of the manufacturer and no further rentals or unit charges would be paid.

4. It is requested that the philosophy as expressed in the report by Mr. Leinau quoted above be ex-

plained and that similar consultations as the ones requested above be held where rates on newly developed machines are being established, and that the thinking expressed in Paragraph 6 of the Report of the Committee, dated July 7, be adopted as the prevailing sentiment of such discussions.

5. The Committee requests that the United cooperate with Association in a study of deferred license fees with a view to revising the right of deduction percentage to the end that the average period of time required for eliminating liability will be not more than ten years and that in no case where a machine is in regular use shall the right of deduction fund accumulation fail to eliminate liability in 20 years.

6. It is also requested that the United institute a study in a few typical factories for the purpose of determining the extent to which machine part costs have increased since 1945, with a view to discovering the reasons for any increase in the number of machine parts being used. After this study has been completed it is requested that the Committee be given the detailed results.

It is the sincere hope of the Committee that the amicable relations which have existed between it and the United can be preserved and that the highly constructive work which was begun can be continued and accelerated.

It should be pointed out, however, that judging by the reactions of shoe manufacturers all over the United States as expressed to the Association the increases announced

by United on July 31 exploded as a bomb shell in the industry and the problems and recommendations outlined above should and must be dealt with if the effective work of the Committee is to continue in a proper atmosphere of cooperation and mutual help.

CHARLES H. JONES, JR.
ALLEN CADWELL
B. A. GRAY
CHARLES F. JOHNSON, JR.
WARREN REARDON
L. B. SHEPPARD
S. L. SLOSBERG
WEIR STEWART
W. W. STEPHENSON

Plaintiff's Exhibit 25 (Part)

* * * * *

The statement of the Committee concludes with listing six specific concessions which we are requested to consider, and I would like to deal briefly with them in order,—

1. It is proposed that we should furnish factual data to justify the increases in our unit charges and that we should do so whenever changes in our price schedules are made in the future. As to this, I have already pointed out that the question of the reasonableness of our lease terms is one of the important issues raised by the government in our anti-trust suit, and is one which we will have to meet in court in due time. I am sure you will understand, therefore, that our lawyers would object to our attempting to comply with your request at this time, even if we felt it would otherwise be proper for us to do so.

2. The suggestion is that we consult in regard to offering additional machines on optional lease or outright purchase basis. As the Committee must know, our whole leasing system is under attack by the government in the anti-trust suit. Consequently, we do not feel that it would be proper for us to discuss or consider any change which would affect our leases or leasing policies until the Court has handed down its decision.

3. It is proposed that after a certain period of time certain machines out on lease would become the property of the lessee. The comment I have

made under No. 2 applies equally to this, but I cannot help but point out that this is merely a proposal that we should discontinue putting out machines on lease and henceforth they should be offered on an installment sale basis, for this is what the proposal really amounts to. In other words, it would appear from this that the Committee is anxious to do away with a leasing system which has been generally recognized as having been highly beneficial to the shoe industry for more than 75 years. I cannot believe that the industry as a whole would go along with any such proposal.

4. I have already pointed out that no such philosophy as has been erroneously attributed to the report by Mr. Lienau has ever been adopted by the Corporation.

5. It is proposed that a study should be made of deferred license fees. Here again, this is a matter having a direct bearing on our leases and leasing policies, and is a subject which we do not feel we can properly discuss at this time on account of the suit.

6. It is suggested that the cost of replacement parts be studied in certain factories. It is not quite clear why such studies are necessary or warranted. However, certain studies have already been made with results which I believe have already been indicated to the Committee. We rather question whether any useful purpose would be served by such further studies.

Plaintiff's Exhibit 25 (Part)

In conclusion I want to repeat that it is our earnest desire to cooperate to the fullest extent with your Committee in regard to any and all matters where we can properly do so.

Plaintiff's Exhibit 26

(See Opposite) ☞

THE HANOVER SHOE, INC.

Machinery Purchased from United Shoe Machinery Corp.

1955

Type of Machine	Model	No. of Machines	Cost
Goodyear Outsole Rapid Lockstitch Machine	O	17	$ 30,974.00
USMC Staple Side Lasting Machine	B	15	55,707.38
USMC Heel Seat Lasting Machine	E	4	53,675.80
USMC Toe Lasting Machine	C	14	83,403.00
Odyr. Welt Butting & Trimming Machine	B	2	16,806.40
McKay Automatic Heel Loading & Attaching Machine	B	7	14,898.87
Odyr. Inseaming Machine	B	10	100,180.00
Odyr. Universal Rounding & Channeling Machine	E	9	17,305.50
Ideal Clicking Machine	C	12	5,036.10
Automatic Heel Compressing Machine	6	2	11,504.87
Rex Assembling Machine	K	8	23,805.27
USMC Fibre Fastening Machine	B	3	9,988.75
USMC Lasting Machine	A	5	13,997.00
Insole Rib Reinforcing Machine	B	4	11,230.92
USMC Upper Trimming Machine	J	2	843.26
Loose Nailing Machine	2	2	4,004.25
Odyr. Stitch Separating Machine	B	7	5,334.60
Odyr. Welt Indenting Machine	C	1	993.50
Odyr. Rapid Bobbin Winding Machine	-	2	249.74
Odyr. Upper Stapling Machine	B	2	1,887.94
Odyr. Welt Indenting & Burnishing Machine	-	2	232.51
Odyr. Welt Beating & Slugging	-	3	2,383.98
USMC Skiving Machine	A	1	239.64
USMC Eyeletting Machine	C	12	8,883.10
USMC Edge Trimming Machine	K	10	1,429.50
USMC Rubbering Machine	G	1	947.78
		157	475,963.66

Machinery Purchased from United Shoe Machinery Corp.

1955

Type of Machine	Model	No. of Machines	Cost
Brought Forward from page 1		157	$ 475,943.66
USMC Tip Finishing Machine	A	2	8,549.44
USMC Splitting Machine	G	2	633.12
USMC Lasting Machine	7	2	1,244.00
USMC Insole Tacking Machine	1	4	1,229.61
Power Welt Tacking Machine	-	2	811.42
USMC Sole Cementing Machine	C	3	704.54
USMC Inseam Cementing Machine	A	3	821.99
USMC Cementing Machine	C	3	582.66
USMC Thermo-Cementing & Folding	A	2	2,450.00
Insole Rib Cementing Machine	A	2	869.08
Rosenow Insole Lip Cementing	C	2	373.91
Duplex eyeletting Machine	B	4	4,035.69
Ideal Twin Clicking Machine	G	3	9,549.23
Crest Heel Blacking Machine	C	4	1,567.84
Improved Gearless Sole Cutting	H	1	764.10
Universal Slugging Machine	-	2	1,956.26
Jointing Machine	G	1	91.56
Planet Sole Rounding Machine	K	1	947.96
Rosenow Insole Lip Setting Machine	B	3	740.62
Heel Breast Scouring & Aligning	A	1	674.21
		206	$ 513,940.50

THE HANOVER SHOE, INC.

Machinery Purchased from United Shoe Machinery Corp.

1956

Type of Machine	Model	No. of Machines	Cost
Rem Pulling Over Machine	C	13	$ 66,654.35
Gdyr. Automatic Sole Leveling Machine	D	4	16,121.16
USMC Skiving Machine	A	22	7,854.65
USMC Edge Trimming Machine	L	9	3,037.92
USMC Edging Machine	B	2	1,831.20
Rapid Folding Machine	J	7	4,155.97
Insole Lip Cutting & Seoring Machine	E	1	243.75
		58	$ 99,899.00

Plaintiff's Exhibit 31

(See Opposite) ☞

31 (9/19/6)

[redacted]

Rentals paid to United Shoe Machinery Corporation on Optional Machines Compared to Total Rentals and Royalties
January 1, 1940 to December 31, 1954

Year	Rentals and Royalties Paid on Lease Only Machines as per Defendant's Answers to Interrogatories	Total Rentals Paid on Optional Machines as per Plaintiff's Books	Total Rentals & Royalties Paid	% Represented by Optional Machine Rentals
1940	88,667.20	1,773.50	90,440.70	1.96
1941	135,612.32	2,076.75	137,689.07	1.51
1942	154,397.91	2,276.33	156,674.24	1.45
1943	151,094.89	2,322.50	153,417.39	1.51
1944	147,683.85	2,532.13	150,216.03	1.69
1945	142,241.66	3,003.00	145,244.66	2.07
1946	139,289.32	3,116.16	142,405.48	2.19
1947	145,160.01	3,775.34	148,935.35	2.53
1948	153,340.00	5,635.06	159,475.86	3.53
1949	164,092.06	6,702.50	171,694.56	3.91
1950	175,656.79	6,835.83	182,492.62	3.75
1951	200,735.41	6,921.66	215,657.07	3.21
1952	192,052.75	6,857.89	198,910.64	3.45
1953	182,062.75	5,676.13	188,555.88	3.01
1954	170,022.06	5,740.50	175,762.56	3.27
	2,353,023.78	64,702.73	2,417,731.51	2.68

Plaintiff's Exhibit 33

(See Opposite) ☞

P-33 (9/14/(v)

THE [illegible] S.A., INC.

Summary of Royalties and Rentals - Paid to U. S. M. C. and Other Shoe Machinery Manufacturers for Shoe Machinery For the Period July 1, 1939 to September 30, 1955

Year	U. S. M. C.	John E. Mitchell	Lasume Mfg. Co.	The Louis O. Freeman Co.	B. B. Chemical Co.	Total of All Others[1]	Annual Totals
1939 (last 6 mos.)	$0,433.65	$60.30	$44.24	$88.00	—	$8.00	$1,603.79
1940	88,667.80	403.70	1,256.79	468.00	—	319.68	91,105.37
1941	135,612.32	493.00	1,361.55	698.00	—	471.36	139,136.23
1942	154,397.91	894.15	2,520.89	714.00	—	83.24	158,610.39
1943	151,096.89	724.80	2,803.81	788.00	—	160.00	155,503.50
1944	147,683.85	701.10	2,747.41	700.40	—	58.00	151,890.76
1945	112,221.66	640.40	2,310.13	864.00	—	38.00	116,894.19
1946	139,389.32	640.40	2,756.37	1,065.80	—	51.50	143,602.59
1947	145,460.81	640.40	2,383.58	1,713.50	57.31	92.00	150,686.80
1948	153,880.80	635.90	2,907.19	1,965.50	2,553.24	325.00	162,196.93
1949	164,892.06	535.80	2,711.49	2,688.75	3,059.74	547.00	175,835.84
1950	175,656.79	535.20	2,569.66	1,366.50	4,116.98	1,983.95	186,143.08
1951	206,735.41	535.20	3,149.45	965.50	4,415.76	1,760.45	219,562.77
1952	192,592.75	472.00	2,583.72	906.00	3,979.20	1,035.00	201,968.67
1953	182,832.75	465.90	2,244.16	676.00	3,570.38	930.00	190,789.19
1954	170,021.66	518.40	1,801.13	—	3,208.49	458.34	176,007.42
1955 (9 mos. for all except USMC which includes charges thru 9/21/55)	111,586.72	496.80	1,817.11	—	2,719.96	337.50	116,638.16
	2,505,011.82	9,007.05	39,468.68	15,648.15	28,171.06	8,464.98	2,606,055.08

Note 1. The companies involved under the caption "Total of All Others" are: Krippendorf Kalculator Co., North American Chemical Co., Tubular Rivet & Stud Co., Atlas Tack Co., Judson L. Thompson Mfg. Co., Compo Shoe Mach. Corp., Dunbar Welder Co., International Shoe Mach. Corp., Lowell Counter Co., Prime Mfg. Co., Hanover Construction Co.

Plaintiff's Exhibit 34

(See Opposite) ☞

THE [illegible] CO., INC.

Analysis of Machinery Purchases

July 1, 1939 to September 21, 1955

Year	PURCHASES FROM United States North Carolina	Other Than U.S.N.C.	Freight, etc.	Total
1939 (From 7/1/39)	$ —	$ 100.00	$ —	$ 100.00
1940	1,530.98	9,093.10	338.62	10,962.02
1941	679.50	10,022.62	336.16	11,038.28
1942	102.00	20,575.50	558.34	21,035.62
1943	—	2,950.00	21.13	2,971.13
1944	32.00	2,935.09	26.57	2,993.66
1945	173.00	9,030.86	44.94	9,248.80
1946	16.72	37,289.87	819.56	37,126.55
1947	530.34	74,727.33	781.59	76,039.26
1948	2,196.97	60,916.63	346.54	63,459.14
1949	1,858.44	23,476.42	90.33	24,705.19
1950	1,337.57	3,804.09	125.99	5,167.63
1951	164.58	62,737.24	1,355.96	64,257.48
1952	5,908.42	27,502.75	221.29	33,632.46
1953	5,505.81	11,988.11	1,046.23	18,538.15
1954	864.26	9,907.10	358.29	11,107.65
9/30/55	2,886.75	12,886.64	285.56	31,061.95
	$ 29,636.98	$ 435,165.80	$ 5,356.09	$ 469,058.77

Deering Machinery 73, V19.09 (p. 457).

335, V16.71

Defendant's Exhibit 5

(See Opposite) ☞

Memorandum for: Davis Polk Wardwell Sunderland & Kiendl

Defendant's Exhibit 5

MACHINES SHIPPED SINCE 1922 WHICH HAD OPTIONAL TERMS TAKEN ON LEASE BASIS, PRIOR TO JANUARY 1, 1955

Name of Machine	HANOVER, PA. No.	Date Shipped	Disposition
Heel-Breast Aligning "A"	189	5. 8.34	7.23.34 Ret.
Great Heel Blacking "G"	96	8.28.28	3.30.53 Ret.
	97	8.28.28	6.30.53 Ret.
	156	3.12.29	6.30.53 Ret.
	157	3.12.29	6.30.53 Ret.
	691	6. 3.53	8.31.55 Sold
	692	6. 3.53	8.31.55 Sold
	693	6. 3.53	8.31.55 Sold
	679	6. 5.53	8.31.55 Sold
USMC Channel Cementing "A"	341	10. 1.43 Tr.	9. 1.44 Tr.
USMC Inseam Cementing "A"	261	6.20.44	8.31.55 Sold
	268	9.27.44	9.27.54 Ret.
	350	1. 5.49	8.31.55 Sold
	267	9.27.44	8.31.55 Sold
	43	12.15.32	3.27.33 Ret.
USMC Sole Cementing "G"	112	6.15.34	9.11.34 Ret.
	42	6.15.34	8.31.55 Sold
	165	12.11.43	7.22.52 Ret.
	113	12. 5.44	8.31.55 Sold
	108	10. 6.44	10.21.52 Ret.
Insole Lip Cutting & Seoring "E"	153	6.11.48	8.31.55 Sold
Insole Tack Cutting "A"	292	10. 8.41	5.31.55 Sold
USMC Embossing "G"	212	1. 8.52	3.14.52 Ret.
USMC Embossing "E"	68	10. 7.47	8.31.55 Sold
USMC Sole Edge Inking "A"	65	7. 3.36	10. 8.36 Ret.
	248	9.12.50	1.11.51 Ret.
Nurling "A"	310	9.22.50	1.11.51 Ret.
USMC Pasting "E"	18	5. 3.26	9.12.34 Ret.
	2573	5. 1.34	9.11.52 Ret.
	2574	5. 1.34	9.11.52 Ret.
	2596	5.23.34	9.11.52 Ret.
	2597	5.23.34	9.11.52 Ret.
	2598	5.23.34	9.11.52 Ret.
	2599	5.23.34	9.11.52 Ret.
	2600	5.23.34	9.11.52 Ret.
	2593	6.15.34	9.11.52 Ret.
USMC Last Pulling "E"	3308	11. 7.40	9.11.52 Ret.
	675	8.21.41	10. 1.47 Tr.
	683	11. 7.41	9.15.47 Tr.
	690	11. 7.41	9.15.47 Tr.
	912	6.20.51	10. 9.51 Ret.
	255	5.13.32	8. 8.32 Ret.
	464	1.17.35	5.29.35 Ret.
Rotary Feather Edge & Shank Reducing "B"	76	7.27.26	6.21.40 Ret.
USMC Shank Reducing "A"	53	8.12.26	9.12.49 Ret.
	439	10. 3.40	12. 6.50 Ret.
USMC Heel Securing "A"	7	6.30.50	2.13.51 Ret.
USMC Twin Edge Setting "D"	605	6.11.34	7. 9.52 Ret.
	606	6.11.34	6.17.55 Ret.
	607	6.11.34	6.17.55 Ret.
	629	8.16.34	6.17.55 Ret.
	630	8.16.34	6.17.55 Ret.
	631	8.16.34	6.17.55 Ret.
	33	11. 1.26	11.26.51 Ret.
	252	4.12.29	10.26.51 Ret.

THE HANOVER SHOE, INC. HANOVER, PA.

Name of Machine	No.	Date Shipped	Disposition
•USMC Twin Edge Setting "F"	2	8. 5.48	6.17.55 Ret.
	305	10.30.50	12. 4.50 Ret.
	311	11. 9.50	11.22.50 Ret.
	312	11. 9.50	11.22.50 Ret.
	556	2.10.53	2.10.53 Sold
•Apex Tap Skiving or Rand Splitting "C"	1512	10.11.49	11. 3.49 Sold
•Regent Stamping "C"	555	10. 1.26	7. 5.40 Ret.
	1808	5.16.40	6. 3.40 Sold
•Shank Piece Sticking "E"	569	1.18.49	7.22.52 Ret.
•USMC Edge Trimming "H"	437	6.19.34	8.31.55 Sold
	438	6.19.34	8.31.55 Sold
	439	6.19.34	8.31.55 Sold
	440	6.19.34	8.31.55 Sold
	441	6.19.34	8.31.55 Sold
	442	6.19.34	8.31.55 Sold
	443	6.19.34	8.31.55 Sold
	444	6.19.34	8.31.55 Sold
	445	6.19.34	8.31.55 Sold
	446	6.19.34	8.31.55 Sold
•USMC Edge Trimming "L"	911	6.17.44	7.24.54 Ret.
	273	7.27.42	7.27.56 Sold
	72	3.20.41	5.21.56 Sold
	287	7.29.44	9. 9.55 Ret.
	291	7.29.44	Form B Lease
	686 Tm	2.16.48	5.31.56 Sold
	755 Tm	2.16.48	8. 9.55 Ret.
	866	4.16.48	5.31.56 Sold
	867	4.16.48	5.31.56 Sold
	854	6.23.48	6.30.56 Sold
	946	6.30.48	6.30.56 Sold
	947	6.30.48	6.30.56 Sold
	1100	9.14.49	Form A Lease
•USMC Cementing "C"	1791	11. 6.44	1. 3.45 Sold
	2002	10. 4.46	11. 8.49 Ret.
•USMC Cementing "F"	2078	11.27.46	11. 8.49 Ret.
•USMC Upper Cementing "A"	18	12.18.50	2. 8.51 Ret.
•Rapid Folding "H"	889	3.14.27	4.20.27 Sold
	217	3.14.27	4.20.27 Sold
	3423	5.27.41	8.21.41 Sold
	3514	1. 9.45	5. 1.53 Ret.
	3516	1. 9.45	5. 1.53 Ret.
	3749	1.15.47	5. 1.53 Ret.
	3517	1. 9.45	8. 1.49 Tr.
	3518	1. 9.45	11. 1.49 Tr.
	3714	11.18.46	5. 1.53 Ret.
	3811	3. 6.47	5. 1.53 Ret.
	3845	4.30.47	5. 1.53 Ret.
	3860 Tm	8. 1.47	5. 2.49 Tr.
	3970	9.12.47	5. 1.53 Ret.
	3971	9.25.47	5. 1.53 Ret.
	4005	10.28.47	11. 1.49 Tr.
•Rapid Folding "J"	3749	1.15.47	5. 1.53 Ret.
	1121	9.15.52	5.31.56 Sold
	1235	3.25.53	5.31.56 Sold
	1236	3.25.53	5.31.56 Sold
	1237	3.25.53	5.31.56 Sold
	1238	3.25.53	5.31.56 Sold
•New Power Hammer "C"	500	7. 5.32	11. 7.32 Ret.
•USMC Perforating "A"	314	6. 1.32 c/from Sale 11.30.32	6. 2.36 Ret.

THE HANOVER SHOE, INC. HANOVER, PA.

Name of Machine	No.	Date Shipped	Disposition
USMC Seam Reducing "A"	21	5.27.54	11. 2.54 Ret.
USMC Upper Reinforcing "A"	6	10. 9.50	4.27.51 Ret.
USMC Seam Rubbing "C"	39	5.16.40	8. 6.40 Ret.
Pique Skiving "H"	950	5. 7.46	10. 8.54 Ret.
	1045	11.15.46	4.18.55 Ret.
	1076	1.31.47	10.17.52 Ret.
USMC Skiving "A"	441	9. 7.33	1.24.50 Ret.
	444	9.13.33	5.31.56 Sold
	442	9.13.33	12. 6.50 Sold
	1582	9.20.40	11.10.55 Sold
	1513	11.26.40	1.12.56 Sold
	1598	2. 7.41	4. 7.56 Sold
	1602	2.25.41	4.25.56 Sold
	1936	6. 4.46	6. 4.56 Sold
	1946	6.12.46	6.12.56 Sold
	2595	4.26.48	5.31.56 Sold
	2278	10. 8.47	5.31.56 Sold
	2300	8. 2.48	5.31.56 Sold
	2818	8.18.50	5.31.56 Sold
	2880	1. 2.51	5.31.56 Sold
	3140	9.23.53	Form A Lease
	2194	6.25.47	5.31.56 Sold
	2201	7.30.47	5.31.56 Sold
	2273	10. 8.47	5.31.56 Sold
	2277	10. 8.47	5.31.56 Sold
USMC Thermo-Cementing & Folding "A"	1020	12.13.54	8.31.55 Sold
"B"	1051	12.27.54	8.31.55 Sold
	21	3.16.54	6.15.54 Tr.

EMMITSBURG, MARYLAND

Crest Heel Blacking "C"	485	Tr. 8. 2.48	10.27.49 Ret.
USMC Channel Cementing "A"	947	Tr. 8. 2.48	7. 8.52 Ret.
USMC Sole Cementing "C"	78	Tr. 8. 2.48	7. 8.52 Ret.
Improved Gearless Sole Cutting "H"	7821	9.24.48	8.31.55 Sold
Insole Lip Cutting & Scoring "D"	1216	10.31.50	4.27.51 Ret.
"E"	415	4. 6.51	2. 1.52 Ret.
USMC Embossing "G"	40	Tr. 8. 2.48	2.14.49 Ret.
	77	6. 6.49	7. 9.52 Ret.
USMC Pasting "E"	2681	Tr. 7. 1.49	7. 8.52 Ret.
	3681	Tr. 7. 1.49	7. 8.52 Ret.
Heel Breast Scouring "H"	704	Tr. 8. 2.48	7. 8.52 Ret.
Heel Scouring "R"	4353	Tr. 8. 2.48	7. 8.52 Ret.
	4859	Tr. 8. 2.48	7. 8.52 Ret.
	4880	Tr. 8. 2.48	7. 8.52 Ret.
Regent Stamping "C"	1639	Tr. 8.16.48	7. 9.52 Ret.
Shank Piece Sticking "B"	540	Tr. 8. 2.48	7. 9.52 Ret.
USMC Edge Trimming "H"	1155	Tr. 8. 2.48	7. 8.52 Ret.
	1156	Tr. 8. 2.48	12.30.54 Ret.
	1157	Tr. 8. 2.48	7. 8.52 Ret.
	1158	Tr. 8. 2.48	7. 8.52 Ret.
USMC Cementing "C"	1702	Tr. 8. 2.48	1.24.50 Ret.
Rapid Folding "H"	2950	Tr. 7.15.48	6.30.53 Ret.
	3236	Tr. 8. 2.48	5. 1.53 Ret.
USMC Skiving "A"	775	Tr. 8. 2.48	1.24.50 Ret.
	2216	Tr. 8. 2.48	5.31.56 Sold
	2300	Tr. 8. 2.48	5.31.56 Sold
USMC Splitting "A"	866	Tr. 8. 2.48	6.15.49 Ret.

THE HANOVER SHOE, INC. MIDDLETOWN, PA.

Name of Machine	No.		Date Shipped	Disposition
USMC Cementing "C"	2174		3.25.47	8.31.55 Sold
	2100	Tr.	4.15.47	8.31.55 Sold
	2105	Tr.	4.15.47	8.31.55 Sold
Rapid Folding "H"	3965		8.26.47	6. 1.49 Tr.
	3966		8.26.47	5. 1.53 Ret.
	3993		10.17.47	5. 1.53 Ret.
Rapid Folding "J"	1120		9.15.52	5.31.56 Sold
	1234		3.25.53	5.31.56 Sold
Pluma Skiving "O"	51		10.16.47	4.18.55 Ret.
	71		11. 5.47	9. 9.55 Ret.
	106		10. 7.47	8. 9.55 Ret.
USMC Skiving "A"	2327		12.17.47	5.31.56 Sold
	2328		12.17.47	5.31.56 Sold
	2342		2. 2.48	5.31.56 Sold
	2587		4. 1.48	5.31.56 Sold
	2368		6.28.48	5.31.56 Sold

Defendant's Exhibit 7

(See Opposite) ☞

UNITED SHOE MACHINERY CORPORATION

BRANCH OFFICE

20 SO. 4TH STREET

CLARENCE E. ROEDER. DISTRICT MANAGER

HARRISBURG, PA.
Hanover, Pa.
August 3, 1950

Hanover Shoe Inc.
Hanover, Penna.

Attention - Mr. R. McDonald
General Superintendent

Dear Sir:

Please sign the attached Forms 3222 covering the eight (8) Goodyear Welt Sewing Machines, Model K, #'s 39,795, 1273, 1274, 1709, 1710, 1879, 3026, and USMC Twin Edge Setting Machines Model D, #'s 33, 252, 605, 606, and 607 to be returned to Beverly, Mass. due to same being replaced with new model Machines.

Please keep one copy for your files, forwarding the remaining two (2) copies to this office. Thank you.

Yours truly,
UNITED SHOE MACHINERY CORP.
HANOVER SUB OFFICE

C. T. Lehn

CTL/dgb

Defendant's Exhibit 7

Defendant's Exhibit 8

(See Opposite) ☞

UNITED SHOE MACHINERY CORPORATION

BRANCH OFFICE
20 SO. 4TH STREET

C. M. SCHMITZ, DISTRICT MANAGER

~~HARRISBURG, PA.~~
anover, Pa.
arch 27, 1952

anover Shoe Inc.
anover, Penna.

Attention - Mr. R. Purtell
eneral Superintendent

Dear Sir:

We are attachin: Request for Return Forms (P3222) covering the return of 6 Pulling Over Machines, Model C, #'s 3524, 3292, 3525, 3526, 3295, 3296.

These machines will be replaced with new machines now on order with us.

We ask that you execute these papers and return three of same to this office, keeping the fourth copy for your files.

Yours truly,
UNITED SHOE MACHINERY CORP.
ANOVER SUB OFFICE

C. M. Schmitz

ctl/dmb
Enc.

Defendant's Exhibit 8

Defendant's Exhibit 9

(See Opposite) ☞

UNITED SHOE MACHINERY CORPORATION

BRANCH OFFICE
20 SO. 4TH ST., HARRISBURG, PA.

C. H. SCHMITZ, District Manager

Hanover, Pa.
December 8, 1952

Hanover Shoe Inc.
Hanover, Pa.

Attention - Mr. R. F. Purtell
General Superintendent

Dear Sir:

Per our telephone conversation of this morning, we are attaching an order and leases for a new Goodyear Welt Butting & Tacking Machine, Model B which is to replace your old Welt Butter #291.

We are also attaching our Request for Return Forms (F3222) covering the return of machine #291.

Confirming Mr. P. H. Randall's conversation with you Friday, December 5, 1952, we wish to advise our Boston Office will waive payment of the head WBT 454 plus which is broken on your old Model Machine. We ask that the executed forms be returned to this office at your earliest convenience.

Yours truly,
UNITED SHOE MACHINERY CORP.
HANOVER SUB OFFICE

C. T. Lehn

CTL/dgb
Enc.

Defendant's Exhibit 9

Defendant's Exhibit 10

(See Opposite) ☞

Defendant's Exhibit 10

March , 1953 19

United Shoe Machinery Corporation
~~20 South Fourth St.~~
~~Harrisburg, Penna.~~

Gentlemen:

We are considering the surrender of the following leased machines for the reasons noted:

Machine & Model	No.	Reasons	Motor Drive
~~Automatic Heel Compressing Machine Model 60~~	119	Replacement for new machines	No

If the machines are surrendered at this time, will you accept them and terminate leases under which they are held?,
We do
We do not desire to have all rights of deduction to which we are entitled applied to deferred payments.

HANOVER SHOE INC.
[signature]

P 3222 REV-2

Defendant's Exhibit 11

(See Opposite) ☞

Defendant's Exhibit 11

April 27, 1953

Mr. C. T. Lehn
United Shoe Machinery Corporation
131 Centennial Avenue
Hanover, Pennsylvania

Dear Sir:

Wish to advise you that this date we are returning to Beverly the Rapid Folding machines, Model H, both from Hanover and Middletown which are now surplus to our requirements as they have been replaced by the Model J Folders.

We are not returning from Middletown machine #2950 as this machine will be held until we have repaired our company owned machine to be used as a spare at Middletown.

We are, therefore, returning from Middletown the following four machines; all model H: 3236, 3811, 3845, and 3966. We note that the transmitter wheel has been chipped on machine 3236, however, there will be transmitters returned with all of the above mentioned machines.

From Hanover we will return the following machines, all Model H: 3514, 3970, 3714, 3971, 3749, 3516, 3993. These machines all will be returned complete with transmitters.

We are also returning from Hanover the five transmitters that were received with our new Model J machines as we have these machines set up on individual motor drive, therefore, we would like to have a return memorandum made from United giving us credit for the return of the transmitters for Model J Folders 1235, 1236, 1237, 1238 and 1121.

Looking forward to your early reply we are,

Very truly yours,

THE HANOVER SHOE, INC.

RFP/cmf

R. F. Partell

Defendant's Exhibit 12

(See Opposite) ☞

UNITED SHOE MACHINERY CORPORATION

BRANCH OFFICE
20 SO. 4TH STREET

C. M. SCHMITZ, DISTRICT MANAGER

Hanover, Pa.
June 17, 1953

Hanover Shoe Inc.
Hanover, Penna.

Attention - Mr. R. F. Purtell
General Superintendent

Dear Sir:

We are herewith attaching orders and leases covering eight (8) Rex Assembling Machines, Model H which you desire to have placed in your factory as replacements for 8 old machines.

We ask that you execute these papers and return same to this office at your first convenience.

Yours truly,
UNITED SHOE MACHINERY CORPORATION
HANOVER SUB OFFICE

C. T. Lehn

CTL/dgb
Enc.

Defendant's Exhibit 12

Defendant's Exhibit 13

(See Opposite) ☞

Defendant's Exhibit 13

March 28, 1955

Mr. C. T. Lehn
United Shoe Machinery Corporation
931 Centennial Avenue
Hanover, Pennsylvania

Dear Sir:

Attached please find the Request for Return Forms to cover one Pluma Skiving Machine, Model O #51 located in our Hanover fitting room and one Pluma Skiving Machine, Model N #1045 located in our Middletown plant.

As we have explained both of these machines will be surplus to our requirements as they are going to be replaced with other machines.

Yours very truly,

THE HANOVER SHOE, INC.

R. F. Purcell

RFP/efm

CC - Mr. George Kelbe
Mr. Paul Arthur
Mr. Bill Leitner
Mr. Keith Kellar

P.S. These are the machines that will be replaced by the two new SAB Skivers. As soon as we receive word from Manufacturers Supplies relative to the three step skiver we will request the return of two model A's to United Shoe.

As soon as these two machines are set up, that is the SAB, make sure that we return the United machines immediately.

APPENDIX D

Defendant's Exhibit 14

(See Opposite) ☞

Defendant's Exhibit 14

June 9, 1953

Mr. C. T. Lehn
United Shoe Machinery Corporation
131 Centennial Avenue
Hanover, Pennsylvania

Dear Sir:

In reply to your letter of June 3rd regarding the results of your examination of our Rex Assembling Machines, Model R we would like to talk to you further regarding the following. The machines which we have in the 1500 series machines 1550, 1595, 1597, 1598, 1539, 1596 were all received in Hanover during the year 1926 and we do feel that we should therefore ask for a replacement on these six assembling machines.

At the same time we would like to consider the advisability of also returning machines 4253, 4619 and 3893 as these machines are quite old even though received in 1937 and 1940 and the only machine that you would call a new machine which is 4619 was received in 1947. Your examination shows that these machines in the 3800, 4200 and 4600 series are in good condition.

I am sure that you are acquainted with what we are trying to work out as far as our [illegible] machines are concerned. If you, therefore, feel that it could be arranged if the rental will stay the same on the new machines at a unit charge per pair of .003 we would like to have the machines replaced with new assembling machines.

Thanking you for your cboperation in this matter, we are,

Very truly yours,

THE HANOVER SHOE, INC.

R. F. Purtell

RFP/cmf

Defendant's Exhibit 15(A)

(See Opposite) ☞

Defendant's Exhibit 15(A)

August 10, 1953

Mr. C. E. Heinbach
United Shoe Machinery Corporation
131 Centennial Avenue
Hanover, Pennsylvania

Dear Sir:

I wish to acknowledge and thank you for your letter of August 6th in which you have very thoroughly outlined to us your suggestions regarding our fibre fastening machine and Universal slugging machine.

We are following your suggestions and requesting that these two machines be replaced and we have this date forwarded to our Mr. Schue your orders and letters to have them signed and sealed and returned to you.

We thank you for your assistance in this matter.

Yours very truly,

THE HANOVER SHOE, INC.

R. F. Purtell

RFP/cmf

Defendant's Exhibit 15(B)

(See Opposite) ☞

Defendant's Exhibit 15(B)

August 13, 19[illegible]

United Shoe Machinery Corporation
[illegible]

Gentlemen:

We are considering the surrender of the following leased machines for the reasons noted:

Machine & Model	No.	Reasons	Motor Drive
[illegible]	[illegible]	To be replaced with new machines.	No
" " "	[illegible]		No
[illegible]	5000		No
" " "	165		No
" " "	576		No

If the machines are surrendered at this time, will you accept them and terminate leases under which they are held?
We do
~~We do not~~
We do not desire to have all rights of deduction to which we are entitled applied to deferred payments.

[illegible]

new Sgy Raymond L. Intell

F 3222 REV-2

Defendant's Exhibit 33 (Admitted R. 548), Page 15

THE HANOVER SHOE, INC.

Meeting Held 8/26/55—L. B. Sheppard, A. W. Cadwell, R. F. Purtell and P. E. Spears present

Special Notes made pertaining to machines which are to be leased from United Shoe Machinery Corporation

Description of Machine	Model	No. of Machines	Notes
Insole Lip Cutting Scoring	E	1	There is a new machine coming out with delivery expected the latter part of Sept. 1955. It was decided to lease this machine until the new machine is available. This machine goes to Form "B" lease in December of 1956. Mr. Sheppard said that we could decide at that time whether to buy the new machine or purchase this United machine.
USMC Edging	B	2 [Bought 6/56]	These machines go to Form "B" lease terms on 3/2/58. It was decided to wait until we have to switch over to Form "B" lease terms before determining whether to lease or buy.
Rex Pulling Over	C	13 [Bought 13 6/56]	We are looking for a new model. First lease changes to Form "B" on 12/9/58. L. B. Sheppard said to think a long time before signing Form "B" lease.
Economy Insole Lip Setting [#725]	B	1	There is a new combination machine coming out.. [(This mach. was returned 5-15-56.)]
USMC Edge Trimming	L	10 [Bought 9 6-9/56]	Postpone buying temporarily awaiting development of Hawks machine.
Rapid Folding	J	5	Postpone buying temporarily until Thermo Plastic machine develops.
USMC Wiring	E	1	Do not buy since it is a low yield machine.
USMC Twin Edge Setting	F	1	This machine may be surplus and returned later.
Rapid Folding	J	2 [Bought 7 6/56]	These machines may be returned later.

(Material in brackets [ ] is in handwriting)

Defendant's Exhibit 33 (Admitted R. 548) Page 22

THE HANOVER SHOE, INC.

Machines which The Hanover Shoe, Inc. expects to continue leasing from United Shoe Machinery Corp.

Description of Machine	Model	(Yrs.) Age of Machines	No. of Machines	Total Annual Rental and Unit Costs Under Form B	Net Cost of Purchase	Average Years to Recover our Investment if Purchased	
Insole Lip Cutting Scoring	E	13	1	117.00	261.00	2.23	[New machine coming out — Delivery will be the latter part of September, 1955. Lease this machine until the new is available. Goes to Form B 12-56. LBS said to buy the new one or this one.]
USMC Edging	B	34	2	582.00	1,960.80	3.37	[3/2/58 goes to Form B—Pay 1.50 per month now and 8,000 units minimum—Goes to 20.25 per month and .10 per 100 units —Wait and see.]
Goodyear Auto. Sole Leveling	D		3*				
Rex Pulling Over	C	43	13	12,468.82	71,917.25	5.77	[Are looking for a new model. First lease to Form B on 12-9-58. LBS said to think long time before signing Form B Lease.]
Economy Insole Lip Setting	B	4	1	174.00	680.37	3.91	[New combination machine coming out]
X Universal Slugging [Buy both per meeting on 8/26/55]		2	2	450.00	1,956.26	4.35	[Question on the use of leather heels in the future. Some days we use both machines to capacity. Oct. 1, 1963 and Oct. 2, 1963 these machines go over to form B lease rate. *Buy these machines.*]

* Will send back to U. S. M. C.

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	Description of Machine	Model	(Yrs.) Age of Machines	No. of Machines	Total Annual Rental and Unit Costs Under Form B	Net Cost of Purchase	Average Years to Recover our Investment if Purchased	
	Goodyear Inseam Trimming	C	2*					
X	Goodyear Welt Butt. & Tack. [Buy them both]	B	7	2	6,458.01	16,806.40	2.60	[*Buy these machines because of capital return*]
	USMC Edge Trimming	L	86	10	1,350.00	3,606.02	2.67	
	[Postpone buying temporarily awaiting development of Hawks]							
	Rapid Folding	J	10	5	795.00	3,174.15	3.99	
	[Postpone buying temporarily until Thermo plastic machine develops]							
	USMC Wiring	E	1**	1	114.00	626.25	5.49	
	[Do not buy since it is a low yield machine]							
	USMC Twin Edge Setting	F	1**	1	210.00	1,350.00	6.43	
	[This machine may be surplus and returned later.]							
	Rapid Folding	J	4	2	318.00	1,269.66	3.99	
	[This machine may be returned later]							
	Totals		[196]	[41]	[16,128.82]	[84,845.50]	[37.85]	
			205	45	23,036.83	103,608.16	44.80	

* Will send back to U. S. M. C.
** Machines shipped in 1954 and 1955 taken as 1 year old
[X Decided on 8/26/55 to purchase these machines]

4.07 Avg. Yrs. to Recover Invest.
11) 44.80 Total Avg. Yrs. to Recover Investment

18.64 Avg. Age of Machine
11) 205 Total Age Years

[THIS WAS NOT CORRECT—SHOULD HAVE BEEN 41.]

[4.21 AVG. YEARS TO RECOVER INVEST.]
[9) 37.85

[4.78 AVG. AGE OF MACH.]
[41) 196]

(Material in brackets [ ] is in handwriting)

Defendant's Exhibit 34 (part)

SALES PRICES FOR OUTSTANDING SHOE MACHINERY

A Basis for Negotiation

Prepared for
National Shoe Manufacturers Association

by

Andrews, Anthony & McLean

in Association with The American Appraisal Co.

NOTE

The points of law in this report, particularly the discussion of the requirements and objectives of the Final Decree, are statements of the views of counsel for National Shoe Manufacturers Association.

Revised May 7, 1955

ANDREWS, ANTHONY & McLEAN
808 Memorial Drive
Cambridge 39, Massachusetts

KENNETH R. ANDREWS
ROBERT N. ANTHONY
JOHN G. McLEAN

April 27, 1955

Mr. Samuel Slosberg, President
National Shoe Manufacturers Association
342 Madison Avenue
New York 17, New York

Dear Mr. Slosberg:

This letter transmits the report embodying the factors that the Technical Committee, at its meeting of April 26,

1955, authorized for use as a basis for negotiations with United Shoe Machinery Corporation on the prices of outstanding machines. Copies of the report will be handed to United's Counsel today.

The six annexes referred to in the report do not accompany it, but will be transmitted in the near future.

The American Appraisal Company was associated in the preparation of this report, especially the section dealing with the "profile" of prices of outstanding machines and the related Annex VI.

The points of law in the report, particularly the discussion of the requirements and objectives of the Final Decree, are statements of the views of counsel for National Shoe Manufacturers Association.

Respectfully yours,

C. J. SCHWINGLE
First Vice President
American Appraisal Company
ROBERT N. ANTHONY
Partner
Andrews, Anthony & McLean

ANNEX I

COST OF CAPITAL

I. INTRODUCTION

This Annex has two main sections. In the first part we will review Dr. Dean's analysis of the cost of capital rele-

vant in this proceeding. Our analysis of his data and procedures reveals a series of biases which lead him seriously to understate the cost of capital involved in this case. In the second section we go on to develop our own estimates of the cost of capital, taking account of additional data which our intensive search has uncovered. Our statistical analysis of the entire body of data—that used by Dr. Dean supplemented with the additional figures we were able to find—leads to an estimate of 18+ per cent as our best estimate of the cost of capital involved in this proceeding.

A. *Points of Agreement*

At the outset it should be emphasized that we are in agreement with Dr. Dean regarding:

1. The meaning to be attached to the concept of a company's cost of capital;
2. The premise that the cost of capital of a shoe manufacturer can best be estimated by taking the weighted average of the costs of his equity capital, his preferred stock, and his debt;
3. The premise that retained earnings should be included as equity capital in these calculations; and
4. The premise that the costs of each type of capital must be estimated after allowing (a) for the "underpricing" (or discount from current prices) necessary to secure market acceptance of a new issue, and also (b) for the costs of flotation (underwriters' commission, selling expenses, registration expenses, and so forth).

On all of these important questions, there are no differences between our position and Dr. Dean's position. With respect to these matters, our only differences with the Dean Report involve the elimination of biases and distortions in the statistical procedures by which he attempted to measure some of these elements.

With one exception we also agree with Dr. Dean's statement of the *purpose* of these estimates as given on pages 1 and 2 of Appendix III of his Report. Dr. Dean takes the position on page 2 of Appendix III (and in the body of his report) that "a shoe factory should accept capital proposals that are more profitable than its cost of capital and should reject proposals whose rates-of-return are less than its cost of capital." As emphasized elsewhere in this presentation, the rate of return which a shoe manufacturer will properly require and expect on the funds invested in a piece of shoe machinery will exceed the *cost* of the capital funds so invested by the amount of the additional allowances which the manufacturer must prudently make to cover the heavy and special risks involved in this type of investment. The character of these risks, and our analysis of the additional allowance which should be made for them is given in Section IV-B-2 of the summary report and in Annex II.

In order to avoid confusion, it is important to bear in mind constantly that this Annex deals exclusively with the *costs* of funds for capital investment, that Annex II deals with allowance for machinery risk, and that the proper required rate of earnings in setting equivalent prices is the *sum* of these two figures. We are in agreement with Dr. Dean that it is necessary to have the best possible estimates of what the cost of capital is, and we are in agreement with

him on the definition of the concept to be measured in finding the cost of capital of any shoe company. In this connection our difference with the Dean Report is simply that the Report maintains that the cost of capital by *itself* is the proper figure for a shoe manufacturer to require new investments to earn prior to capital charges in order to be profitable. We maintain that the required earnings are *higher* than this figure.

* * * * *

III. Estimates of Cost of Capital of Typical Shoe Manufacturer

It will be recalled that we are in complete agreement with the Dean Report on the meaning of the concept of a company's cost of capital, and that the best estimate of the cost for any given company is obtained by taking a weighted average of the probable costs of its equity capital (including retained earnings), its preferred stock, and debt. We also agree with the position of the Dean Report that

> "... the purpose ... (is) to find prices that would be substantially equivalent to lease terms in the future ... (and that) ... the best basis for such a projection ... of the 'normal' cost of capital that would prevail in the future ... is an average of the recent past which irons out random movements from year to year and cyclical savings in the stock market." (Appendix III, page 7)

We believe, however, that our estimate of the costs of capital for the typical shoe manufacturer should be the best

estimate which can be made on the basis of *all* the evidence available on the costs of capital for shoe companies. This conviction led us to do two things.

First of all, we searched all the available records to get all the relevant data we could find. We obtained three different recent directories of shoe manufacturers in the United States, as well as the membership list of the National Shoe Manufacturers Association. Every name appearing in one or more of these lists was then checked against the *National Monthly Stock Summary*[1] and the *Bank and Quotation Record.*[2] These two sources give the most inclusive and reliable tabulations of the price quotations on stocks in the over-the-counter market, and the latter has a complete coverage of quotations involved in transactions on all the major stock exchanges in the country.[3] We then obtained data on per share earnings, capital structure, sales, total assets, and dividends from listings in Moody's Investors Service, supplemented in some cases by direct correspondence with the companies and by information secured through Dun and Bradstreet. This search, virtually completed before Dr. Dean's worksheets were available to us, gave us data for

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[1] Published by the National Quotation Bureau, Inc., New York, New York.

[2] Published monthly by William B. Dana Company, New York, New York.

[3] We included companies from the over-the-counter market only in those instances where we could find at least six quotations during any given year. Entries for individual months were the high bid and the low asked price. We then averaged all such data for the average figure for the year. In some months for some companies there was more than a 20 per cent spread between the bids and asks (or there were several different "high bids" in different months, but no asks). In these cases we use an average price 10 per cent greater than the average of the monthly high bids available.

three or more years on a total of twenty-nine shoe manufacturing companies. This was seven more than the twenty-two *shoe* companies in Dr. Dean's list. Most of the additional firms were smaller companies, information on which is especially important in this proceeding. For reasons already given, we omitted data for any company for years in which sustained losses and both earnings and price data were not available for all years in every case. This extensive search of the records gave us 207 company-years of data.[1]

Secondly, in view of the importance of making the estimates as reliable as possible, and the limited amount of data which even our exhaustive search had uncovered, we believed it was imperative that the estimates be based on the procedures that would make use of the indications of all the available evidence most efficiently. This clearly called for a cross-sectional multiple regression analysis of all the available data on all the companies, and this is the procedure we adopted in making the vital estimate of the required earnings-price ratio for the common stock of the typical shoe manufacturing company.

With this background, we proceed to describe our estimates of the costs of capital for the typical shoe manufacturer. It will be recalled that, if the Decree is interpreted to mean literally the typical or median shoe manufacturer, we need estimates for the cost of capital of such a company.

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[1] In addition to loss years, we excluded two observations where earnings per share were reported to be $0.01 and $0.02, which are so small as not to be significantly above zero in view of the inherent uncertainty in certain aspects of income measurement from accounting records, and would give unreliable ratios to earnings. We did, however, include all other reports of positive earnings even when they represented very sharp declines from previously prevailing levels of earnings.

with assets of approximately $500,000. On the other hand, if the Decree referred to the manufacturer of the typical or *median shoe,* we need to consider the probable costs, based on all the information available, of a shoe manufacturer with assets of between $3 and $4 million. We will use an asset figure of $3.5 million for this company.

A. *Earnings-Price Ratio for Common Stock*

We made a multiple regression analysis of the new relation between earnings-price ratio and (a) asset size of company, (b) the company's capital structure measured by its equity-debt ratio, (c) its dividend payout, and (d) the time within the eight-year period to which each of our 207 observations referred. The regression as a whole had a relatively high degree of statistical significance—much higher than is common in most cross-section studies of data for different companies.[1] The *net* relation between earnings-price ratios and asset size showed that *the earnings yields required in the market on shoe stocks was very significantly higher the smaller the company* even after allowing fully and separately for the effects of the other factors that affected this ratio.[1] We did not find that the effect of the equity-debt ratio was significant, and we wanted to find the value of the earnings-price ratio as it *averaged* over the postwar period. We consequently set these two

[1] The multiple correlation coefficient was .429. Such a value would arise by chance from an uncorrelated universe of as few as 45 independent elements less than five times in a hundred, while values higher than .351 will be found less than 1 per cent of the time if this is no true correlation and the sample has the equivalent of only 100 independent observations.

variables equal to their average values and had the following estimating equation:

$$E/P = 15.83 - .089\ (A=17.6) - .058\ \left(\frac{D}{E} - 57.8\right)$$

where E/P is the earnings-price ratio in percentage points, A is asset size in millions of dollars and D/E is the percentage of earnings paid in dividends. Using a normal dividend payout of 60 per cent, this indicated that the market in the postwar years required an earnings-price ratio of 16.95 per cent on the common stock of companies with $3.5 million assets, and 17.22 per cent for smaller companies with assets of only $500,000. It should be noted that smaller companies probably would not pay out this large a fraction of their earnings in dividends as a general practice and that lower dividend payouts would mean that their earnings yields required on the stock would be higher than their 16.95 and 17.22 per cent we have calculated. Nevertheless, we have used these figures to be conservative in our calculations and conclusions.

B. *Cost of Equity Capital*

These earnings-price ratios had to be adjusted to allow for underpricing and costs of flotation. We used the same

[1] The net regression coefficient was —.089 between earnings-price ratio measured in percentage points and asset size in millions of dollars. This was *3.8 times* its "standard deviation" on the basis of 207 observations, a value which could arise by chance if the true value were zero very much less than 1 per cent of the time, providing the observations were truly independent. As an allowance for this latter factor, we may note that this coefficient would still be significant at the 5 per cent level if we deal with no more than the equivalent of sixty fully independent observations. On this basis the appropriate standard error would be .043 and the odds in favor of our conclusion would be better than 19 to 1.

adjustment of 15 per cent which Dr. Dean used for *underpricing*. This involved raising the previous figures in the ratio of 1.00/.85, which gave figures of 19.94 per cent and 20.26 per cent respectively for $3.5 million and $500,000 companies.

We have already seen that the best available evidence indicated that *costs of flotation* are 14.3 per cent and 17 per cent for these two sizes of companies. Adjusting the preceding figures to allow for these cost of flotation gave our final estimates of the costs of equity capital for shoe manufacturers. Those estimates are 23.28 per cent for the $3.5 million company producing the *median shoe* and 24.41 per cent for the *median shoe* company having assets of $500,000.

C. *Costs of Preferred Stock Capital*

For the dividend yield required on preferred stock of shoe companies, we simply used the data in Table III-5 of the Dean Report. As previously noted,[1] these data tend to show that these requirements are higher for smaller companies, so we used the average of the figures shown in the Table for the three smallest companies having preferred stock outstanding, this average for the dividend yield being 6.17 per cent. Again, we used Dr. Dean's adjustment of 15 per cent to allow for underpricing, but for the *cost of issuing* preferred stock we used the data given on page A-16 above which the SEC Studies show to be the appropriate

[1] Page A-16 above.

allowance for these small companies. On this basis we find that the cost of issuing preferred stock would be 8.38 per cent to the $3.5 million company and 8.44 per cent to the $500,000 median shoe manufacturer.

D. *Cost of Debt*

The smaller shoe companies in Table III-5 of the Dean Report had, after taxes, costs of bonded debt that ranged from 2.0 per cent to 3.0 per cent or from 4 to 6 per cent before taxes. But these figures are too low for smaller companies because the Dean Report allowed only 1.0 per cent for costs of flotation whereas the SEC data given above on pages A-11, 12 and 16 show these costs average as high as 8 to 10 per cent for the issues of smaller companies. Moreover, it is well known that the costs of bank borrowing by smaller companies tend to fall in the range of 4 to 6 per cent, if not higher. Studies of the costs of debt to different sizes of companies have uniformly shown that inherent rates and costs are progressively higher for smaller companies than for larger ones.[1] It is also known that the shoe industry is one in which factoring is most common, and that the use of this source of capital—whose annual cost before taxes runs as high as 10 to 14 per cent—is predominantly found among smaller companies.

The net of all such evidence is that an estimate of 3 per cent is probably a substantial understatement of the cost of

[1] See, for example, "Structure of Interest Rates on Business Loans", *Federal Reserve Bulletin*, July, 1947.

debt after allowing for taxes for small shoe manufacturers. Even though the figure is a very conservative one, we have used it in our final estimate.

E. *Final Estimates of the Cost of Capital*

A company's over-all cost of capital is the weighted average of the costs of common equity, preferred stock, and debt. In making these estimates, we assumed that both the $3.5 million and the $500,000 company had common equity equal to 74 per cent of its total capital.[2] We then assumed that 5 per cent of the total is preferred stock and 21 per cent debt. For the larger of these companies—that producing the median shoe—this gave 18.4 per cent as our estimate of the over-all cost of capital to the manufacturer. The corresponding figure for the median shoe company with $500,000 assets is 19.1 per cent.

Since the proportions of preferred stock and debt within the 26 per cent of capital other than common equity are quite uncertain, we have added one final set of figures in the interest of conservatism. Since preferred stock costs more than debt, we have considered the limiting case which arises when all capital other than common stock consists of debt and there is no preferred stock outstanding at all. The results given in Exhibit I-6 show that even under this lim-

[2] We failed to find any significant pattern of relationship between the equity-other capital ratio and company size among the companies for which we had data. The average of the ratio of the market value of equity to sum of this value plus preferred stock, noncurrent debt, and notes payable is for all companies in the sample 74 per cent.

Defendant's Exhibit 34 (part)

iting situation, *the costs of capital are no less than 18 per cent for either firm.*

On the basis of this analysis, we have used 18 per cent as the cost of capital in all other calculations in this report.

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Defendant's Exhibit 48

(See Opposite) ☞

TABLE III

ASSUMPTIONS A*

THE ECONOMIC COST OF LEASING: EFFECT OF THREE ELEMENTS OF ECONOMIC COST ON LEIDESDORF'S COMPUTATION OF NET COSTS OF LEASING (Plaintiff's Exhibit 41), 1939-1955

	1939	1940	1941	1942	1943	1944	1945	1946	1947	
Plaintiff's Exhibit 41 (the Leidesdorf fourth computation) does not state correctly the economic costs of leasing.										
1. Leasing costs are overstated to the extent that capital would have been recovered through tax savings when rentals were deducted from income as an expense.										
(a) Leidesdorf computed net costs of leasing (Exhibit 41).	$ 25,520	$ 57,258	$ 94,046	$ 107,880	$ 106,245	$ 103,660	$ 98,933	$ 96,319	$ 101,590	$ 11
(b) Relevant rate at which income was taxed.	24.2%	28.9%	67.7%	90.7%	93.7%	99.7%	89.2%	91.8%	91.7%	
(c) Capital recovered through tax savings: i.e., the relevant tax rate (Item b) times net costs of leasing (Item a).	$ 6,174	$ 16,548	$ 63,669	$ 97,847	$ 99,552	$ 103,312	$ 88,248	$ 49,261	$ 92,363	
(d) Net capital employed in leasing: i.e., net costs of leasing (Item a) less capital recovered through tax savings (Item c).	$ 19,344	$ 40,710	$ 30,377	$ 10,033	$ 6,693	$ 348	$ 10,685	$ 54,058	$ 39,227	$ 4
2. Leasing costs are understated because no account is taken of the future worth of net working capital employed.										
(a) The future worth of net capital employed (its value on September 21, 1955) is calculated by multiplying the net capital employed in leasing (Item 1 d) by a factor which compounds the annual figure at 11%. (Hanover's cost of capital)	9.2765	8.1372	7.1379	6.2613	5.4924	4.8179	4.2262	3.7072	3.2519	
(b) Future worth of net capital employed in leasing (Item 2 (a) times Item 1 (d)).	$ 179,445	$ 331,269	$ 216,828	$ 62,820	$ 36,761	$ 4,495	$ 45,157	$ 207,818	$ 127,600	$ 18

* ASSUMPTIONS A - This term is used here to indicate that identical "assumptions" are used in the development of this Table as were used in Leidesdorf's "fourth computation" accompanying [illegible] to Donovan, Leisure, Newton & Irvine, dated April 19, 1961. These assumptions are set forth in an appendix accompanying that computation entitled, "Assumptions and Data Used in Computation of Net Costs of Leasing and Net Costs of Ownership for Machine Types 01 through 820 from July 1, 1939 to September 21, 1955". Principal among these assumptions were the following:

". . . Service costs are assumed to be the same under leasing or ownership, accordingly such costs are deducted from rental and royalty charged."

"The determination of machinery lives is based upon historical data of shipments to and returns from "Hanover" to "United" as set forth in answers to interrogatories dated April 9, 1959, by "United"."

"The unit cost of the machinery acquired in the various years was computed by applying the adjusted Consumer Price Index to the January 1, 1955 unit cost."

"The unit cost of the used machinery disposed of in the various years was computed by applying the adjusted Consumer Price Index to the January 1, 1955 used machinery unit cost."

	1943	1944	1945	1946	1947	1948	1949	1950
0	106,245	103,660	90,933	96,319	101,590	113,238	126,181	134,260
%	93.7%	98.7%	89.2%	91.8%	91.7%	91.5%	91.9%	60.5%
7	99,552	102,312	88,248	90,261	92,363	96,994	52,239	82,687
33	6,693	1,348	10,685	54,058	59,227	64,249	73,942	53,823
43	5.4924	98.79	4.2262	3.7072	3.2519	2.8536	2.5023	2.1950
20	36,761	6,495	43,157	207,818	192,600	188,968	185,025	118,141

re used in Leidesdorf's "fourth computation" accompanying their Labor
portation entitled, "Assumptions and Data Used in Computation of
l among these assumptions were the following:
and royalty charged."

as set forth in answers to interrogatories dated April 9, 1951, by "Exhibit"
the January 1, 1955 unit cost."
Index to the January 1, 1955 steel machinery unit cost."

	1951	1952	1953	1954	1955	Total

Defendant's Exhibit 49

(See Opposite) ☞

TABLE IV

DERIVATION OF MARGINAL INCOME TAX RATE FOR THE HANOVER SHOE, INC.

	EFFECTIVE FEDERAL TAX RATE	EFFECTIVE PENNSYLVANIA TAX RATE					MARGINAL TAX RATE
	Determined from Hanover's Federal Tax Returns. This is the percent of total Federal income tax that would have been paid on any additional dollar of net income.	TAXABLE MARGINAL INCOME LESS DEDUCTIONS: Federal income tax allowed as deduction 1939 to 1942. Computed as 1.00 minus Federal rate.	ALLOCATION PERCENT: Obtained from statements attached with Hanover's Federal returns. This allocates the percent of additional dollar that is subject to State tax.	ALLOCATED MARGINAL INCOME: Product of the Columns (3) times (4) for 1939 to 1942. 1943 to 1955 taken from Column (4)	PENNSYLVANIA TAX RATE: From Prentice-Hall Tax Service Book. (This is a "flat" rate for all income.)	EFFECTIVE PENNSYLVANIA TAX RATE: Product of (5) times (6)	Sum of Columns (2) plus (7). This is the percent of additional dollar of income that would be paid out as taxes.
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
1939	.19	.810	.9240	.7484	.07	.052	.242
1940	.24	.760	.9257	.7035	.07	.049	.289
1941	.655	.345	.9298	.3208	.07	.022	.677
1942	.90	.100 (Federal tax was not deducted hereafter)	.9357	.0936	.07	.007	.907
1943	.90	1.000	.9362	.9362	.04	.037	.937
1944	.95	1.000	.9327	.9327	.04	.037	.987
1945	.855	1.000	.9324	.9324	.04	.037	.892
1946	.38	1.000	.9412	.9412	.04	.038	.418
1947	.38	1.000	.9201	.9201	.04	.037	.417
1948	.38	1.000	.8790	.8790	.04	.035	.415
1949	.38	1.000	.8466	.8466	.04	.034	.414
1950	.571	1.000	.8513	.8513	.04	.034	.605
1951	.5075	1.000	.8431	.8431	.05	.0422	.550
1952	.52	1.000	.8597	.8597	.05	.043	.563
1953	.52	1.000	.8873	.8873	.05	.044	.564
1954	.52	1.000	.8569	.8569	.05	.043	.563
1955	.52	1.000	.8757	.8757	.05	.044	.564

TABLE IV (Continued)

DERIVATION OF MARGINAL INCOME TAX RATE FOR THE HANOVER SHOE, INC.

The rates shown here were derived with the assistance of the personnel in USMC Tax Department. The comments made below are the rationale used by them to derive the rates shown in the "Effective Federal Tax Rate" column.

Year	Federal Normal Income Tax Rate	Federal Excess Profits Tax Rate Applicable to Hanover	Comments	Effective Federal Tax Rate
1939	19%	-	No excess profits statute. Effective Federal tax rate is normal rate	19%
1940	24	no tax	Excess profit statute, but Hanover has no excess profits. Effective rate is normal rate.	24
1941	31	50%	Hanover has excess profits. Excess profits tax is deductible from normal tax income, hence tax is 50% of additional dollar plus 31% of remaining 50% of additional dollar.	65.5
1942	40	90	Excess profit tax not deductible from normal tax income, but normal tax does not have to be paid on additional dollar taxed at excess profit rate.	90
1943	40	90	Same as above.	90
1944	40	95	Same as above.	95
1945	40	85.5	Same as above.	85.5
1946	38	-	No excess profits statute. Effective tax rate is normal rate.	38
1947	38	-	Same as above.	38
1948	38	-	Same as above.	38
1949	38	-	Same as above.	38
1950	42	30% (15.1)	Excess profits statute. Hanover has excess profits. Additional dollar would be taxed at 42% plus 30% as excess profit rate, but 30% was in effect only 184 days out of 365 days, which makes the rate 15.1% on an annual basis. Marginal tax is sum of 42% plus 15.1%.	57.1
1951	50.75	no tax	Excess profit statute, but Hanover has no excess profits. Effective rate is normal rate.	50.75
1952	52	no tax	Same as above.	52
1953	52	no tax	Same as above.	52
1954	52	-	No excess profits statute. Effective rate is normal rate.	52
1955	52	-	Same as above.	52

Defendant's Exhibit 51

(See Opposite) ☞

TABLE VI

ASSUMPTIONS A*

THE ECONOMIC COST OF OWNERSHIP: EFFECT OF THREE ELEMENTS OF ECONOMIC COST ON LEIDESDORF'S COMPUTATION (Plaintiff's Exhibit 44b), 1939-1955

	1939	1940	1941	1942	1943	1944	1945	1946	1947	19
The ownership calculations in Plaintiff's Exhibit 44, as computed by Leidesdorf, do not state the full economic costs of ownership; they do not reflect the effect of income taxes, capital gains taxes, and the cost of the capital employed.										
1. Ownership costs are overstated to the extent that capital would have been recovered through tax savings when depreciation was deducted from income.										
(a) Cost of new machinery acquired as determined by the Consumer Price Index (derived from Plaintiff's Exhibit 44).	$ 356,490	+	$ 48,436	$ 57,292	$ 21,916	$ 4,783	$ 7,368	$ 8,008	$ 14,595	$ 25
(b) Depreciation calculated on 10-year straight-line method.	$ 17,825	$ 35,649	$ 40,493	$ 46,222	$ 48,414	$ 49,092	$ 49,529	$ 50,330	$ 51,790	$ 54
(c) Relevant rate at which income would have been taxed.	24.2%	28.9%	67.7%	90.7%	93.7%	98.7%	89.2%	41.8%	41.7%	41
(d) Capital recovered through depreciation; i.e., tax rate (Item c) times depreciation (Item b).	$ 4,314	$ 10,303	$ 27,414	$ 41,923	$ 45,364	$ 48,454	$ 44,180	$ 21,038	$ 21,596	$ 22
(e) Cost of new machinery acquired (Item a) less capital recovered through depreciation (Item d).	$ 352,176	$ (10,303)	$ 21,022	$ 15,369	$ (23,448)	$ (41,671)	$ (39,812)	$ (13,030)	$ (7,001)	$ 2
2. Ownership costs are understated to the extent that disposal recoveries would have been reduced by necessity of paying capital gains taxes on all recoveries in excess of book value of disposed of machines.										
(a) Disposal recoveries as determined by Consumer Price Index (derived from Plaintiff's Exhibit 44).	+	+	+	+	+	+	+	+	+	+
(b) Disposal recoveries subject to capital gains tax.	+	+	+	+	+	+	+	+	+	+
(c) Relevant tax rate.	+	+	+	+	+	+	+	+	+	+
(d) Capital gains taxes; recoveries subject to tax (Item b) multiplied by the relevant tax rate (Item c).	+	+	+	+	+	+	+	+	+	+
(e) After-tax disposal recoveries would be disposal recoveries (Item a) less capital gains taxes (Item d).	+	+	+	+	+	+	+	+	+	+
3. In calculating economic costs of ownership, it is necessary also to consider the future worth of net capital employed.										
(a) (i) Ownership costs adjusted for income taxes (Item 1 e).	$ 352,176	$ (10,303)	$ 21,022	$ 15,369	$ (23,448)	$ (41,671)	$ (39,812)	$ (13,030)	$ (7,001)	$ 2
(ii) Disposal recoveries (Item 2 e).	+	+	+	+	+	+	+	+	+	+
(iii) Net capital employed in ownership (Item 3 a less Item 3 c).	$ 352,176	$ (10,303)	$ 21,022	$ 15,369	$ (23,448)	$ (41,671)	$ (39,812)	$ (13,030)	$ (7,001)	$ 2
(b) Future worth of net capital employed (the value on September 21, 1955) is calculated by multiplying the net capital employed by a Future Worth factor.										
(i) Factor which compounds the annual figure at 11% (Hoover's cost of capital).	9.2765	8.3372	7.3379	6.2613	5.4924	4.8179	4.2262	3.7072	3.2519	2
(ii) Item 3a (iii) times Item 3b (i).	$ 3,266,961	$ (85,838)	$ 154,253	$ 96,230	$ (128,780)	$ (200,762)	$ (168,253)	$ (48,305)	$ (22,767)	$ 7

* ASSUMPTIONS A - this term is used here to indicate that identical "assumptions" are used in the development of this Table as were used in Leidesdorf's "fourth computation" accompanying their letter to Donovan, Leisure, Newton & Irvine, dated April 19, 1961. These assumptions are set forth in an appendix accompanying that computation entitled, "Assumptions and Data Used in Computation of Net Costs of Leasing and Net Costs of Ownership for Machine Types #1 through #80 from July 1, 1939 to September 21, 1955."

". . . Service costs are assumed to be the same under leasing or ownership, accordingly both costs are deducted from rental and royalty charges."

"The determination of machinery lives is based upon historical data of shipments to and returns from 'Shipmen' to 'United' as set forth in answers to interrogatories dated April 9, 1956, by 'United'."

"The unit cost of the machinery acquired in the various years was computed by applying the adjusted Consumer Price Index to the January 1, 1955 unit cost."

"The unit cost of the used machinery disposed of in the various years was computed by applying the adjusted Consumer Price Index to the January 1, 1955 used machinery unit cost."

	1943	1944	1945	1946	1947	1948	1949	1950	1951	1952	1953	1954	1955	Total
2	$ 21,916.	$ 4,783.	$ 1,368.	$ 8,008.	$ 14,595.	$ 25,256.	$ 379,861.	$ 73,366.	$ 183,481.	$ 285,581.	$ 81,418.	$ 184,728.		$ 1,468,582.
2	48,414.	49,092.	(149,529.	50,330.	51,790.	54,316.	74,978.	63,987.	72,497.	95,320.	101,277.	119,067.	89,179.	1,059,440.
%	93.7%	98.7%	89.2%	41.8%	41.7%	41.5%	41.4%	60.5%	55.0%	58.3%	56.4%	58.3%	58.8%	
3	45,369.	48,454.	49,180.	21,038.	24,596.	22,541.	30,839.	38,712.	38,873.	53,445.	57,120.	67,036.	58,299.	629,440.
9	(23,448.	(41,671.	(39,812.	(13,030.	(7,001.	2,715.	349,039.	34,654.	93,608.	23,916.	24,298.	117,693.	(50,894.	1,056,926.
	—	—	—	—	—	—	22,397.	—	50,069.	58,893.	53,765.	86,559.	955,463.	1,226,801.
	—	—	—	—	—	—	22,397.	—	50,069.	58,893.	53,765.	86,559.	332,825.	604,961.
	—	—	—	—	—	—	25 %	—	25 %	26 %	26 %	26 %	25 %	
	—	—	—	—	—	—	5,599.	—	12,517.	14,792.	14,499.	22,495.	83,206.	153,107.
	—	—	—	—	—	—	16,798.	—	37,552.	43,101.	41,266.	64,064.	871,957.	1,013,694.
9	(23,448.	(41,671.	(39,812.	(13,030.	(7,001.	2,715.	349,039.	34,654.	93,608.	23,916.	24,298.	117,693.	(50,894.	1,056,926.
	—	—	—	—	—	—	16,798.	—	37,552.	43,101.	41,266.	64,064.	871,957.	1,013,694.
9	(23,448.	(41,671.	(39,812.	(13,030.	(7,001.	2,715.	332,241.	34,654.	56,056.	180,815.	(16,968.	53,629.	(822,751.	(14,787.
3	5,924.	4,879.	2,262.	3,972.	3,259.	2,854.	2,823.	2,950.	1,824.	4,690.	4,816.	1,894.	1,400.	
1	(28,280.	(209,762.	(168,253.	(48,905.	(23,767.	2,795.	83,351.	71,464.	107,958.	32,588.	(26,136.	48,748.	(1,051,366.	3,157,473.

...ve used in Leidenfrost's "Length computation" corresponding sheets ...
...ight computations entitled, "Computations and data used in Com... 1955."
...and royalty charges."
...on for Truth in Concrete to Leidenfrost/Lovich dated ...

...the January 1, 1955 audit cost."
...ter to the January 1, 1955 mine machinery cost audit."

Defendant's Exhibit 70

(See Opposite) ☞

THE HANOVER SHOE, INC.

HANOVER, PA., E. BERLIN, PA. AND MIDDLETOWN, MD.

RIGHT OF DEDUCTION FUND

Use of Fund During Fiscal Year

Balance at End of Fiscal Year, February 28		Deferred Payments	For Purchase of Machines	3 Months Unemployment Credits	Waiver C 4 Larges
1940	$21,438.50	$1,979.34	-	None	$25.
1941	24,367.10	650.50	-	None	57.
1942	28,592.99	1,580.00	-	None	16.
1943	34,713.71	70.00	-	None	28.
1944	40,255.61	None	-	$39.93	57.
1945	44,305.13	None	-	55.90	71.
1946	44,458.13	None	-	[illegible].46	34.
1947	46,512.66	None	-	None	Non
1948	48,697.35	50.00	-	103.86	105.
1949	50,956.09	2,710.00	-	106.64	111.
1950	57,753.07	4,676.65	-	[illegible]	76.
1951	62,948.52	1,981.20	-	[illegible]	65.
1952	60,538.89	2,810.50	-	[illegible]	42.
1953	[illegible]045.23	4,932.74	-	30.[illegible]	82.
1954	[illegible]239.82	10,706.00	-	None	11.
1955	49,847.42	8,280.83	-	[illegible]	18.
	(6,600.00 Fund				
1956	(5,487.60 Spec. Fd.	None	$39,841.21	None	67.
		$40,428.26		$[illegible]	$672.

EMMITSBURG, MD.

1948	-	None	-		
1949	-	$ 148.15	-	None	$ 308.
1950	-	975.22	-	$132.07	181.
1951	-	831.55	-	581.55	491.
1952	-	8,676.15	-	144.00	241.
1953	-	-	-	6.21	81.
		$10,432.92		$864.77	$1,304.

The Fund for all factories was consolidated into one account February 1, 1949

Waiver Credits year and also the remaining January 1 of t

E HANOVER SHOE, INC.

. BERLIN, PA. AND MIDDLETOWN, MD.

T OF DEDUCTION FUND

Fund During Fiscal Year

For Purchase of Machines	3 Months Minimum Credits	Waiver Credits for 4 Largest Months	Total Minimum Charges	For Calendar Year
-	None	$25.84	$25.84	193[illegible]
-	None	57.76	57.76	1940
-	None	16.63	16.63	1941
-	None	28.79	28.79	1942
-	$39.53	57.24	97.17	1943
-	55.90	71.59	127.49	1944
-	[illegible].46	34.69	35.15	1945
-	None	None	None	1946
-	103.86	105.07	208.93	1947
-	106.64	111.64	218.28	1948
-	[illegible]	76.18	97.83	1949
-	[illegible]	65.34	105.54	1950
-	[illegible]	42.27	91.09	1951
-	[illegible]	82.37	103.20	1952
-	None	11.31	11.31	1953
-	None	18.70	18.70	1954
$39,841.21	None	67.06	67.06	1955
	[illegible]	$872.43	$1,280.77	

EMMITSBURG, MD.

-				
-	None	$ 308.57	$ 308.57	1948
-	$132.07	181.35	313.42	1949
-	581.95	491.46	1,073.01	1950
-	144.88	241.75	386.63	1951
-	6.87	81.68	87.95	1952
	$864.77	$1,304.81	$2,169.58	

Waiver Credits (4 largest months) for each calendar year and also the use of the Fund against the remaining 8 months were made after January 1 of the following year.

Defendant's Exhibit 73

(See Opposite) ☞

Defendant's Exhibit 73

REASONS FOR RETURN TO UNITED OR TRANSFER TO OTHER SHOE MANUFACTURERS BY HANOVER OF 418 LEASED UNITED MACHINES BETWEEN 1946 AND SEPTEMBER 21, 1955

		Number of Lease Only Machines	Number of Optional Terms Machines	Total Number of Machines
A.	Replaced by later model USMC	28	11	39
B.	Surplus	111	49	160
C.	Unsuccessful trial	3	6	9
D.	Replaced by other type USMC	15	0	15
E.	Replaced by new machine - same model	86	19	105
F.	Per option in Plan for Terminating Form A Leases dated 5/16/55	15	4	19
G.	Replaced by competitive machine	50	5	55
H.	Unknown	12	4	16
		320	98	418

73-1

418 LEASED UNITED MACHINES WHICH HANOVER RETURNED TO UNITED OR TRANSFERRED TO OTHER SHOE MANUFACTURERS BETWEEN 1946 AND SEPTEMBER 21, 1955 AND THE REASONS FOR SUCH RETURNS OR TRANSFERS

A. LEASE ONLY MACHINES*

Machine Type and Serial Number	Year Returned or Transferred	Reason for Return or Transfer
1. Goodyear Outsole Rapid Lockstitch D		
3405	1953	E
3435	1953	E
3436	1953	E
4440	1953	E
4963	1953	B
5199	1952	B
5900	1954	B
6393	1952	E
6487	1954	B
6586	1952	E
6664	1952	E
6909	1954	E
10680	1955	F
10681	1955	F
10684	1955	F
2. USMC Staple Side Lasting B		
1590	1952	E
1608	1952	E
1609	1952	E
1622	1954	E
1631	1954	E
1633	1954	E
1640	1954	E
1642	1954	E
1911	1953	E
1912	1953	E
1914	1953	E
1989	1954	E
1997	1954	E
2393	1953	G
3135	1954	E
3. USMC Heel Seat Lasting E		
286	1953	E
320	1953	E
395	1953	E

*Until January 1, 1955 when sales prices were published for all new machines.

73-2

Machine Type and Serial Number	Year Returned or Transferred	Reason for Return or Transfer
3. USMC Heel Seat Lasting E (cont.)		
408	1953	E
417	1953	E
426	1952	B
591	1949	B
619	1952	B
955	1955	F
4. USMC Toe Lasting C		
40	1954	B
241	1952	B
298	1952	B
335	1947	C
451	1954	B
517	1954	B
566	1952	B
5. Goodyear Welt Butting and Tacking B		
28	1952	B
67	1955	F
6. Rex Pulling Over C		
3119	1949	E
3125	1949	E
3292	1952	E
3294	1952	B
3295	1952	E
3296	1952	E
3524	1952	E
3525	1952	E
3526	1952	E
3955	1952	B
4090	1953	E
4095	1953	E
4097	1953	E
4227	1953	E
4379	1952	E
4456	1952	E
5803	1954	B
6057	1955	F

73-3

Machine Type and Serial Number	Year Returned or Transferred	Reason for Return or Transfer
7. McKay Automatic Heel Loading and Attaching B		
1472	1952	B
2423	1952	B
8. (a) Goodyear Welt Sewing K		
739	1950	D
795	1950	D
819	1949	D
1273	1950	D
1274	1950	D
1709	1950	D
1710	1950	D
1879	1950	D
2026	1950	D
2069	1949	B
2241	1951	D
2913	1951	D
2920	1951	D
4967	1950	B
5343	1951	D
5522	1952	B
5535	1952	B
(b) Goodyear Inseam Sewing B		
79	1954	B
545	1955	F
9. Goodyear Universal Rounding and Channeling E		
665	1952	E
924	1952	E
1102	1952	B
1370	1952	B
3063	1952	B
3654	1954	B
10. Goodyear Automatic Sole Leveling D		
1077	1948	E
1094	1949	E
1176	1949	E
1177	1952	B
1859	1952	B
1964	1954	E

D3-4

Machine Type and Serial Number	Year Returned or Transferred	Reason for Return or Transfer
11. Goodyear Inseam Trimming C		
362	1948	E
419	1952	B
439	1953	B
473	1948	E
1153	1952	B
1825	1955	F
12. Ideal Clicking C		
451	1953	B
545	1953	B
962	1953	G
1404	1953	B
2103	1953	B
2174	1953	G
4126	1953	G
4815	1949	B
6580	1949	B
9098	1949	B
9162	1953	G
9881	1949	B
10510	1953	G
10512	1953	G
10675	1949	B
10685	1953	G
10690	1949	B
10722	1953	B
10731	1953	G
11126	1951	H
11138	1951	H
11151	1951	H
11159	1951	H
11163	1951	H
11175	1951	H
11540	1954	G
12034	1953	G
12035	1953	G
12277	1954	G
12318	1954	G
12323	1954	G
16256	1953	G
16265	1953	G
16266	1953	G

73-5

Machine Type and Serial Number	Year Returned or Transferred	Reason for Return or Transfer
12. Ideal Clicking C (cont.)		
16267	1953	G
16268	1953	G
16269	1953	G
16288	1953	G
16289	1953	G
16313	1949	B
16315	1953	G
20176	1951	H
22718	1949	B
24738	1951	G
24756	1951	G
25447	1951	H
25497	1951	H
25498	1951	H
25860	1951	H
13. Automatic Heel Compressing 6		
119	1953	E
120	1954	E
14. Rex Assembling H		
1528	1952	E
1535	1952	E
1539	1953	E
1550	1953	E
1595	1953	E
1596	1953	E
1597	1953	E
1598	1953	E
3893	1953	E
4253	1953	E
5535	1955	F
15. USMC Fibre Fastening B		
120	1952	B
296	1953	E
355	1953	E
356	1952	B
362	1948	E
618	1949	B
882	1952	B

Machine Type and Serial Number	Year Returned or Transferred	Reason for Return or Transfer
16. USMC Lacing A		
9	1949	B
303	1955	F
17. Economy Insole Channeling B		
178	1954	E
225	1952	E
475	1954	G
579	1954	E
1700	1955	F
18. Insole Rib Reinforcing B		
294	1952	E
19. USMC Upper Trimming J		
319	1954	G
447	1952	B
20. Loose Nailing 2		
416	1951	D
2642	1952	B
2677	1952	B
2681	1955	F
2694	1953	B
21. Universal Slugging		
1863	1952	B
5878	1953	E
5980	1953	E
6165	1953	E
6607	1955	F
22. Power Welt Tacking		
4551	1953	B
23. Ultima Heel Trimming		
1676	1951	G
2039	1951	G
2306	1951	G
2307	1951	G
2420	1951	G
3184	1952	B

Machine Type and Serial Number	Year Returned or Transferred	Reason for Return or Transfer
24. Goodyear Rapid Bobbin Winding		
694	1952	E
1366	1952	E
4044	1952	B
25. Goodyear Welt Beating and Slashing		
67	1952	B
872	1952	E
1136	1954	B
2011	1952	E
2018	1954	B
26. Goodyear Impression Stitch Burnishing 2		
1326	1952	B
27. (a) Goodyear Improved Sole Laying E		
367	1948	A
368	1951	G
369	1948	A
460	1951	G
1386	1952	B
(b) Goodyear Improved Sole Laying F		
168	1951	G
183	1951	G
560	1952	G
662	1951	G
663	1952	B
702	1951	G
(c) Goodyear Sole Laying A		
28. Goodyear Stitch Separating B		
99	1948	E
29. Goodyear Welt Indenting and Burnishing		
1214	1950	B
2104	1952	B

73-8

Machine Type and Serial Number	Year Returned or Transferred	Reason for Return or Transfer
30. Goodyear Upper Stapling B		
1524	1949	B
1528	1954	E
1553	1949	B
1667	1952	B
31. Goodyear Welt Butting and Tacking		
170	1948	A
291	1952	E
315	1950	A
1135	1952	B
32. Goodyear Jointing D		
33. Economy Insole Lip Cementing C		
55	1952	E
34. Economy Insole Lip Setting B		
64	1952	E
35. Economy Insole Reinforcing C		
71	1948	A
386	1948	A
36. USMC Lasting 7		
922	1949	A
1146	1949	A
1383	1947	B
1552	1947	B
1565	1948	A
1919	1948	A
1941	1947	B
1975	1948	A
3392	1948	A
3358	1948	A
3777	1948	A
3780	1950	B
3789	1948	A
3792	1948	A
3793	1950	B
4366	1949	A

73-9

Machine Type and Serial Number	Year Returned or Transferred	Reason for Return or Transfer
36. USMC Lasting 7 (cont.)		
4368	1949	A
5435	1949	A
5799	1947	B
5819	1948	A
6005	1948	A
6308	1949	A
6040	1948	A
6224	1949	A
6351	1948	A
37. (a) USMC Insole Tacking 1		
1214	1952	B
2849	1955	B
2967	1952	B
3204	1952	H
3232	1954	B
3536	1952	B
3931	1952	B
(b) USMC Insole Tacking 3		
327	1952	B
38. (a) USMC Eyeletting C		
188	1954	E
223	1953	E
413	1953	E
419	1949	B
420	1949	B
422	1953	E
451	1951	E
587	1948	B
1936	1948	B
3140	1955	F
3604		
(b) Duplex Eyeletting		
476	1948	A
608	1949	B
1927	1952	B
2293	1949	A

73-10

Machine Type and Serial Number	Year Returned or Transferred	Reason for Return or Transfer
38. (cont.)		
(c) Duplex Eyeletting B		
822	1955	F
39. (a) USMC Edging		
(b) USMC Edging B		
143	1948	E
341	1950	B
40. USMC Tip Finishing A		
114	1950	B
41. Ensign Lacing B		
2972	1951	A
42. USMC Splitting G		
43. Grip Tacking B		
2127	1947	D
44. Staple Fastening D		
45. USMC Wiring E		
46. (a) Xpedite Finishing D		
(b) Xpedite Finishing E		
167	1950	G
168	1950	G
169	1950	G
171	1950	G
172	1952	G
173	1950	G
368	1952	B

Machine Type and Serial Number	Year Returned or Transferred	Reason for Return or Transfer
47. Heel Breast Scouring and Aligning A		
48. Planet Sole Rounding E		
346	1952	B
49. Edge Setting and Wheeling A		
2963	1950	B
50. Ideal Twin Clicking G		
51. Goodyear Welt Indenting C		
33	1955	B
52. USMC Sewed Seat Lasting A		
9	1953	B
53. USMC Stitchdown Thread Lasting B		
894	1951	B
54. Rex Rotary Pounding and Trimming B		
3534	1952	B
55. USMC Celastic Conditioning		
1379	1948	B
1498	1954	B
1667	1954	G
1968	1954	G
1977	1948	B
2056	1954	G
2059	1955	G
56. Goodyear Automatic Bobbin Winding A		
33	1952	B
57. USMC Eyelet Stay Cementing and Applying A		
7	1952	C
58. USMC Sole Stitching C		
1238	1951	B

73-12

Machine Type and Serial Number	Year Returned or Transferred	Reason for Return or Transfer
59. Naumkeag Buffing		
3045	1946	B
5607	1950	B
60. Jointing G		
128	1948	B
188	1954	B
191	1948	B
656	1951	B
61. Goodyear Outsole Stitching A		
4	1951	C
62. Insole Rib Cementing A		
154	1952	B

B. OPTIONAL TERMS MACHINES

63. USMC Shank Reducing A		
53	1946	B
439	1950	B
64. Pluma Skiving H		
950	1954	B
1045	1955	G
1076	1948	B
65. USMC Last Pulling B		
675	1947	B
683	1947	B
690	1947	B
66. Rapid Folding H		
2950	1953	E
3236	1953	E
3514	1953	A
3516	1953	A
3517	1949	B
3518	1949	B
3714	1953	A
3749	153	A

Machine Type and Serial Number	Year Returned or Transferred	Reason for Return or Transfer
66. Rapid Folding H (cont.)		
3811	1953	E
3845	1953	E
3860	1949	B
3965	1949	B
3966	1953	E
3970	1953	A
3971	1953	B
3993	1953	B
4005	1949	B
67. USMC Cementing C		
1702	1949	B
2002	1949	B
2078	1949	B
68. USMC Skiving A		
441	1949	B
442	1949	B
775	1949	B
69. USMC Embossing G		
40	1949	B
77	1952	B
70. USMC Splitting A		
866	1949	B
71. Crest Heel Blacking C		
96	1953	E
97	1953	E
156	1953	E
157	1953	E
485	1949	B
72. USMC Twin Edge Setting F		
2	1955	E
305	1950	B
311	1950	B
312	1950	B

7,3-14

Machine Type and Serial Number	Year Returned or Transferred	Reason for Return or Transfer
73. USMC Sole Edge Inking A		
248	1950	C
310	1950	C
74. USMC Sole Cementing C		
78	1952	B
105	1952	B
108	1952	B
75. Shank Piece Sticking B		
540	1952	B
569	1952	B
76. Regent Stamping C		
1639	1952	B
77. Insole Rib Cementing A		
154	1952	B
78. USMC Channel Cementing A		
947	1952	B
79. USMC Edge Trimming H		
911	1954	B
1155	1952	B
1156	1954	B
1157	1952	B
1158	1952	B
80. USMC Pasting E		
2573	1952	E
2574	1952	E
2593	1952	E
2596	1952	E
2597	1952	E
2598	1952	E
2599	1952	E
2600	1952	E
2681	1952	B
3308	1952	E
3681	1952	B

73-15

	Machine Type and Serial Number	Year Returned or Transferred	Reason for Return or Transfer
81.	Heel-Breast Scouring N		
	704	1952	B
82.	Heel Scouring R		
	4353	1952	B
	4859	1952	B
	4880	1952	B
83.	USMC Thermo-Cementing and Folding B		
	21	1954	C
84.	USMC Inseam Cementing A		
	268	1954	B
85.	USMC Twin Edge Setting D		
	33	1951	G
	252	1951	G
	605	1952	B
	606	1955	A
	607	1955	A
	629	1955	A
	630	1955	A
	631	1955	A
86.	Pluma Skiving O		
	51	1955	G
	71	1955	F
	106	1955	F
87.	Insole Lip Cutting and Scoring D		
	1216	1951	A
88.	USMC Upper Reinforcing A		
	6	1951	C
89.	USMC Cementing F		
	18	1951	G
90.	Insole Lip Cutting and Scoring E		
	415	1951	B
91.	USMC Heel Scouring A		
	7	1951	C

73-16

	Machine Type and Serial Number	Year Returned or Transferred	Reason for Return or Transfer
92.	Insole Tack Cutting A		
	212	1952	C
93.	USMC Seam Reducing A		
	21	1954	H
94.	Goodyear Insole Spotting and Pressing A		
	10	1955	H
95.	Goodyear Insole Rounding and Trimming A		
	10	1955	H
96.	Goodyear Insole Rib Tucking A		
	14	1955	H
97.	USMC Edge Trimming L		
	287	1955	F
	755	1955	F

73-17